

(22,359)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 152.

CONSOLIDATED TURNPIKE COMPANY, ARTHUR W.
DEPUE, AND WALTER H. TAYLOR, TRUSTEE, PLAIN-
TIFFS IN ERROR,

vs.

NORFOLK AND OCEAN VIEW RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF
VIRGINIA.

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1 In the Supreme Court of Appeals of Virginia, at Richmond.

NORFOLK & OCEAN VIEW RAILWAY COMPANY

v.

CONSOLIDATED TURNPIKE COMPANY et als.

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

Your petitioner, the Norfolk and Ocean View Railway Company, humbly shows that it is aggrieved by an order of the Circuit Court of Norfolk County, of the 6th day of August, 1909, in a certain condemnation proceeding therein depending, directing the payment by it the said Norfolk and Ocean View Railway Company, to the credit of said court in said cause, of the sum of \$57,200.00; and certain other orders in said court in said proceedings, previously entered, and especially the order entered on the 14th day of April, 1906, appointing commissioners in said cause; and your petitioner prays that said orders and the judgments therein provided may be reviewed and reversed, for the errors hereinafter set out. A transcript of the record is herewith presented as a part hereof.

2 This cause is an attempt to exercise the power of eminent domain by the receivers of the Federal Court, against a strip of land about five miles long, constituting a part of the highway of the Consolidated Turnpike Company running from the City of Norfolk to a point at or near Ocean View, in Norfolk County.

Statement of Facts.

The Tanners Creek Drawbridge Company was incorporated by Act of the General Assembly of Virginia, approved February 7th, 1865. This company was authorized by its charter to construct and maintain a turnpike from the City of Norfolk, through Norfolk County, to Ocean View.

In the year 1900, the Consolidated Turnpike Company was organized under the laws of the State of Virginia, and acquired by consolidation a number of turnpikes and roads adjacent to the City of Norfolk, including the turnpike road of the Tanners Creek Drawbridge Company; and thereupon, the Consolidated Turnpike Company executed its mortgage to Walter H. Taylor, trustee, to secure an authorized issue of \$200,000 of its bonds, the same to be a lien upon its properties. A part of the bonds authorized by this mortgage have been issued and are now outstanding.

The Bay Shore Terminal Company was incorporated by an Act of the General Assembly of Virginia, approved March 3, 1900, and pursuant to its charter undertook to construct an electric railway in the City of Norfolk, and from the City of Norfolk to Ocean View, along a strip of land a part of the original turnpike of the Tanners Creek Drawbridge Company, but then a part of the highway of the

Consolidated Turnpike Company. At the time of the construction of the railway of the Bay Shore Terminal Company, the two corporations—the Bay Shore Terminal Company and the Consolidated Turnpike Company—were controlled by the same officers; they had the same president, and the board of directors of each was practically the same. Under these conditions the Bay Shore Terminal Company entered into a contract with the Consolidated Turnpike Company, to purchase the strip of land belonging to the Consolidated Turnpike Company, in consideration of the following:

\$22,500.00 bonds of the Bay Shore Terminal Company;

\$5,625.00 par value of the stock of the Bay Shore Terminal Company;

To build and maintain a new drawbridge over Tanners Creek;
To furnish, without cost, electricity for the operation of said draw, if the same were operated by electric current; and a deed
3 dated the 1st day of March, 1902, was duly executed and delivered, by which the Consolidated Turnpike Company conveyed, with general warranty, unto the Bay Shore Terminal Company, the strip of land 18 feet wide, extending from Norfolk City Park to Tanners Creek; and a strip of land 25 feet wide extending the whole length of the road from Tanners Creek to Ocean View; also a tract of land described in the deed, upon which the power house of the railway was subsequently located.

In said deed reference was made to the then existing indebtedness of the Consolidated Turnpike Company, and in consideration of which the bonds and stock, in accordance with the provisions of the deed, were transferred and delivered to Walter H. Taylor, trustee, to be held by him as a part security for the indebtedness of the Consolidated Turnpike Company.

The Bay Shore Terminal Company in the fall of the following year became insolvent, and in a suit instituted in the Circuit Court of the United States for the Eastern District of Virginia, under the style of "Fink v. Bay Shore Terminal Company & others," that court, on the 9th day of October, 1903, appointed receivers for the property and assets of the company. The matters in issue in the receivership cause were referred to a special master to report the liens and encumbrances upon the property, and to have other inquiries preparatory to a foreclosure sale. In the report of the special master, after reciting the facts as to the acquisition of the right of way in question, and the deed of trust to Walter H. Taylor, trustee, hereinbefore set forth, he says:

"It appears from said deeds that the title of the Bay Shore Terminal Company to its right of way from Norfolk City Park to Ocean View, and the said parcel of land, is encumbered by the liens of said deed of trust. The consideration paid by the Bay Shore Terminal Company to the Consolidated Turnpike Company was paid in bonds and in work, as stated in the deed of the last named company to the Bay Shore Terminal Company, and was at the time said deed was made, in the opinion of the special master, ample consideration for a good, sufficient and perfect title to said right of way and parcel of land; and there is no further obligation on the part of the

Bay Shore Terminal Company to the Consolidated Turnpike Company to be performed before the said Consolidated Turnpike Company shall make its deed to the Bay Shore Terminal Company perfect. The special master, therefore, recommends that the receivers of the Bay Shore Terminal Company be required to demand of the Consolidated Turnpike Company such action on its part as

4 will release the said right of way and parcel of land from the encumbrance of said deeds of trust; and in the event said Consolidated Turnpike Company shall refuse and fail to do so the said receivers shall be required to clear the title of the said right of way and parcel of land of all encumbrances, by condemnation proceedings, or otherwise. While the receivers have not been, and may not be, disturbed in the possession and use of such right of way and parcel of land, the title to the same is of such vital interest to any future purchaser or owner of said Bay Shore Terminal Company that it should not be left with any cloud upon it."

In accordance with this report the Circuit Court of the United States for the Eastern District of Virginia, on January 20th, 1906, entered its decree in part as follows:

"It appearing to the court, from the report of special master, R. T. Thorpe, that the Bay Shore Terminal Company has never acquired title to a portion of its right of way, and to the property upon which its power house is located, the court doth adjudge, order and decree that B. W. Leigh, H. L. Page and J. A. C. Groner, receivers, do proceed in the proper court or courts to institute condemnation proceedings for the purpose of acquiring title to said property. The said receivers are hereby authorized to take any and all necessary steps to institute and conduct said condemnation proceedings to as speedy a termination as possible."

Pursuant to this order of the court the receivers filed their petition in the Circuit Court of Norfolk County asking for the appointment of commissioners to ascertain what would be a just compensation for the fee simple interest in a strip approximately five miles in length, and a part of the highway of the Consolidated Turnpike Company, and in addition, a parcel of land to be used as the location for a power house, all of which property had prior thereto been conveyed by the Consolidated Turnpike Company to the Bay Shore Terminal Company.

Following the filing of the petition notice was personally served upon the Consolidated Turnpike Company and Walter H. Taylor, trustee, and upon other parties interested in said strip of land, or who it was believed might have such interest; and as to all other parties notice was given by publication. Both the notice personally served and the publication described the strip of land as 18 feet wide, while the petition referred to the strip of land as 25 feet wide. Upon the return day of the notice Arthur W. Depue, claiming to be the owner of certain of the mortgage bonds of the Consolidated Turnpike Company, appeared and filed a demurrer and answer to the petition, and also a written motion to dismiss said petition, for reasons fully set forth (pages 22-26), among the grounds for such motion insisting that the receivers had no power or authority under the laws of Virginia to institute condemnation proceed-

ings, that said petition was not in accordance with the laws of the State of Virginia; and that the Consolidated Turnpike Company, being a public service corporation, could not be proceeded against, or its property acquired, in condemnation, without the certificate of the State Corporation Commission that a public necessity or essential public convenience required it; and because of the material difference in the description of the property in the petition and in the notice.

Demurrers and answers, and motions to dismiss, were filed by others (pp. 29-37). The court overruled the demurrers and the motions to dismiss; and on the 14th day of April, 1906 (p. 59), entered an order appointing commissioners, in accordance with the prayer of the petition of the receivers.

On the 13th day of May, 1906, the commissioners so appointed filed their report with the court, in which they reported compensation for the 25 ft. strip, and the other real estate, making their report in the alternative: first, considering the property as of the first day of May, 1902 (the day upon which the Bay Shore Company entered upon the turnpike property under the conveyance of the — day of March, 1902), they fixed the amount of the award at \$5,000.00; second, considering the property as of the date of their report, with all the improvements, railroad tracks, poles, overhead structures, machinery and power house, they fixed the amount of their award at the sum of \$57,200 (R., p. 65).

While the condemnation proceedings were pending, but before commissioners were appointed, the Circuit Court of the United States for the Eastern District of Virginia, on March 17, 1906, entered a decree foreclosing the mortgage of the Bay Shore Terminal Company, and ordering the property to be sold for the payment of the debts of that company; and before the report of the commissioners in condemnation, that is, in May, 1906, the property was sold for the sum of \$765,000. Subsequently the sale was confirmed, and the purchasers, as provided by the laws of the State of Virginia, organized a corporation known as the Norfolk and Ocean View Railway Company, and the property of the Bay Shore Terminal Company was conveyed to said railway company.

Shortly after the purchase of the Bay Shore Terminal property and the conveyance of the property to the Norfolk and Ocean View Railway Company, Arthur W. Depue as a holder of an alleged indebtedness of the Consolidated Turnpike Company, secured a judgment against said company, and upon application to the Circuit Court of Norfolk County secured the appointment of a receiver for the Consolidated Turnpike Company, and asked for a foreclosure of the mortgage which had been reported by the special master in the equity cause in the Circuit Court of the United States to be a cloud upon the property of the right of way of the Bay Shore Terminal Company. Thereupon, the Norfolk and Ocean View Railway Company filed its petition in the Circuit Court of the United States in the above mentioned equity cause, praying for an injunction against said Depue and Walter H. Taylor, trustee, prohibiting them from in any way interfering with the possession and use of the

right of way along the turnpike. The Norfolk and Ocean View Railway Company claimed the protection of the court, and the right to have its rights and interests litigated therein, as to the property covered by its deed, and further asked the court to adjudge that full consideration had been paid to Walter H. Taylor, trustee, for the land in controversy; and that the court should take such steps as might be necessary to protect the title conveyed to the said Norfolk and Ocean View Railway Company, as the purchaser, under its decrees. An injunction was granted, and has been since maintained. No further proceedings have been had under the petition, however.

At the August term, 1909, of the Circuit Court of Norfolk County, Arthur W. Depue appeared in said court and asked leave to withdraw all objections and exceptions theretofore made to the condemnation proceedings, in which Walter H. Taylor, trustee, joined him; and moved the court to confirm the report of the commissioners making the award of \$57,200. The receivers, the petitioners in the condemnation proceedings, did not appear in the court, but the Norfolk and Ocean View Railway Company appeared specially and moved the court to vacate and dismiss the condemnation proceedings, for reasons set forth in its written motion (p. 78), and for reasons apparent upon the record. The court overruled the motion of the Norfolk and Ocean View Railway Company to dismiss said proceedings; and upon the motion of said Depue, and against the objection of the Norfolk and Ocean View Railway Company, entered an order on the 6th day of August, confirming that portion of the report of the commissioners in condemnation, which made the award of \$57,200.

It does not appear that the receivers of the Circuit Court of the United States have ever made any report of their action under the order directing these proceedings to be taken, nor has the

7 Circuit Court of the United States had this matter presented to it in any form, for action.

To secure a review of the action of the court in entering the order of August 6, 1909, overruling the motion of the Norfolk and Ocean View Railway Company to vacate and dismiss said proceedings, and confirming said report; and also the action of the court in appointing commissioners in this cause, by its order of the 14th day of April, 1906, this petition is filed.

The strip of land involved in this controversy is of vital importance to the petitioner, the Norfolk and Ocean View Railway Company, as a part of its right of way, and is approximately five miles in length. Your petitioner is advised that the Circuit Court of the United States in the equity proceedings therein pending, in which the Bay Shore property was sold, has full power and authority, independent of the condemnation proceedings, to adjust the claims between the several parties to the property in question, and that said condemnation proceedings should not have been instituted, and are not now necessary to secure a good title for your petitioner, and has so presented its claim in the petition for injunction heretofore referred to (p. 147). Should, however, your petitioner be in error in this position, and it be determined that condemnation proceedings

are necessary to secure a good title, your petitioner is desirous that such proceedings be so instituted and prosecuted as to secure, as against all parties, a good and sufficient title.

Your petitioner is advised that the condemnation proceedings had by said receivers are fatally defective and erroneous in many particulars, and that if your petitioner should comply with the order and direction of the Circuit Court of Norfolk County and pay the large sum of money directed to be paid in these proceedings, to-wit, \$57,200.00, yet it would not secure a good title. Among the many errors in said proceedings, for which said proceedings should be reviewed and set aside, your petitioner calls attention to the following:

First Assignment of Error.

The court erred in entering the order of the 14th day of April, 1906, appointing commissioners in this cause, for the following reasons:

1. The petition was filed, and the motion made, by receivers of the Circuit Court of the United States, who had no authority under the statute law of Virginia to institute such proceedings.

2. The property sought to be acquired by condemnation was the property of a public service corporation—the Consolidated Turnpike Company—and neither the receivers nor any corporation can, in Virginia, take by condemnation proceedings any property belonging to another corporation possessing the power of eminent domain, “unless after hearing all parties in interest, the State Corporation Commission shall certify that a public necessity or that an essential public convenience shall so require, and shall give its permission thereto.” No hearing was had by the Corporation Commission; consequently no certificate was issued, nor permission granted.

3. Said petition did not allege that the land sought to be condemned was necessary for the purposes of the receivers or for the corporation which they were operating; nor did it allege that they were unable to agree with the owners.

4. There was no plat or survey of the property sought to be acquired, filed with the petition, as required by statute.

5. The notice served and published did not describe the same property referred to in the petition of the receivers.

I.

The petition was filed, and the motion made, by receivers of the Circuit Court of the United States, who had no authority under the statute law of Virginia to institute such proceedings.

The receivers of the Circuit Court of the United States were not authorized under the laws of the State of Virginia to institute condemnation proceedings. As has been said by this court, “the right of eminent domain resides in the Legislature, which alone controls the measure of its bestowal.”

It has been said time and again that statutes relating to the ex-

ercise of the power of eminent domain must be strictly construed. See *Norfolk & Western R. R. Co. v. Lynchburg Cotton Mills*, 106 Va. 378.

"The right must be exercised in the manner, and upon the terms and conditions prescribed by the act conferring the power." *Charlottesville v. Maury*, 96 Va. 383.

"So high a prerogative as that of divesting one's estate against his will, should only be exercised where the plain letter of the law permits it, and under a careful observance of the formalities prescribed for the owner's protection." *Cooley on Constitutional Limitations*, p. 657; recited in *Painter v. St. Clair*, 98 Va. 90.

The delegation of the power of eminent domain, by the Legislature of Virginia, is contained in an act concerning the exercise of the power of eminent domain appearing as section 1105-f of Pollard's Code. It nowhere suggests the exercise of this power by other than a corporation, either public or quasi public, and the manner of exercise of the right clearly indicates that the Legislature contemplated action by corporate officers. The Legislature of Virginia has not seen fit to authorize the exercise of this power by parties acting under the authority or direction of either State or Federal judges. The first matter to be determined when the power is invoked is whether or not a public necessity exists. With municipal bodies the law provides for this question to be determined by the quasi legislative body. With public service corporations this question is determined by boards of directors acting as trustees for varied interests—for the public, as well as for the stockholders. If the receivers of a court are to exercise this power, it might be in direct opposition to the will and judgment of the board of directors of the corporation, and against what this body might consider the best interests of the corporation, as well as of the public. The receivers of corporate property are appointed to take possession of and preserve the assets of the corporation, and it is not within their powers to extend and increase the property, to an extent which would call for the exercise of the power of eminent domain.

The petition to be filed in instituting condemnation proceedings under our statute, must be verified by the oath of one of the officers or directors of the corporation desiring to exercise the power (sec. 1105-f, sub-div. 4 of Pollard's Code). The petition instituting these proceedings, however, was signed by the receivers. The corporation in whose interests it is claimed that the condemnation proceedings were had, continued organized, with a president, board of directors and other officers, and it was for them to determine, under our statute, whether these proceedings should have been instituted; and, should they determine it wise to do so, to direct their officers to do what was necessary or proper in the premises.

II.

The property sought to be acquired by condemnation was the property of a public service corporation—the Consolidated Turnpike Company—and neither the receivers nor any corporation can,

in Virginia, take by condemnation proceedings any property belonging to another corporation possessing the power of eminent domain, "unless after hearing all parties in interest the State Corporation Commission shall certify that a public necessity or that an essential public convenience shall so require, and shall give its permission thereto." No hearing was had by the Corporation Commission; consequently no certificate was issued, nor permission granted.

The provision of the statute prohibiting the condemnation by one corporation of the property of another having the right to exercise the power of eminent domain, except under certain conditions, is plain and explicit. Should it be determined that the receivers of the Federal court had the power to exercise the power of eminent domain which belonged to the corporation whose property and assets they held, it can not be contended that they could proceed in direct violation of the plain prohibition of our statute. The failure on the part of the receivers to present this matter to the State Corporation Commission renders these proceedings utterly null and void. This does not seem to your petitioner to admit of discussion. This provision of the law prohibiting condemnation of property of public service corporations, is a necessary provision for the protection of corporations engaged in public service, as well as for the protection of the public.

III.

Said petition did not allege that the land sought to be condemned was necessary for the purposes of the receivers or for the corporation which they were operating; nor did it allege that they were unable to agree with the owners.

There are certain preliminary steps which are essential to the validity of condemnation proceedings.

Sub-division 4 of section 11004, which provides for the filing of a petition by the corporation desiring to institute condemnation proceedings, requires that the petition shall "set forth the interest or estate intended to be taken in the land or other property, and the material facts upon which the application for the appointment of commissioners is based, including the fact that the land or other property or the interest or estate therein, sought to be condemned, is wanted for the uses and purposes of the company."

Independently of statutory provision, it is universally held that the petition must set forth that the land sought to be acquired is necessary for the purposes of the corporation.

Another essential prerequisite which must be alleged and proven is the inability to agree with the owner, and it is said that where the record fails to show such inability to agree the proceedings are generally held to be void. *Lewis on Eminent Domain*, par. 301.

The petition in this case does not set up inability to agree, nor any facts from which this could be determined. There are no suggestions of negotiations of attempted purchase, if the purchase was necessary. As to such provisions, this court said in *Core v. City of Norfolk*, 99 Va. 190:

"It is well settled that such provisions are regarded as in the nature of conditions precedent, which are not only to be observed and complied with, before the courts can exercise their compulsory powers to deprive the owner of his land, but the party instituting such proceedings must show affirmatively such compliance."

We recall that in the case mentioned, though there had been some preliminary correspondence and negotiations, this court held that such evidence was not a sufficient compliance with the requirements of the statute. Referring to section 1074 of the former Code, which provided: "If * * * council for the city * * * can not agree upon the terms of purchase with those entitled to the lands wanted, it may institute condemnation proceedings"—which provision is similar to the present law—the court said:

"Under the provisions of that section the Councils of the City of Norfolk had no authority to institute, and the court had no jurisdiction to entertain, any proceedings to condemn the lands wanted, until after the councils had made an attempt to purchase them from the plaintiff in error, and the parties had been unable to agree upon the terms of purchase."

IV.

There was no plat or survey of the property sought to be acquired, filed with the petition, as required by statute.

Section 1105-f, sub-division 4, provides that along with the petition there must be filed in the clerk's office, a plat of the survey, with a profile showing the cuts, fills, trestles and bridges, and a description of the land or other property which, or an interest or estate in which, is sought to be condemned.

While the petition filed by the receivers referred to a plat or survey accompanying it, the papers in this cause do not disclose any such plat or survey, and the transcript of the record forwarded by the clerk of the court does not contain such plat; and as evidence that no plat was filed, the record shows that one of the parties
12 who appeared in answer to the notice, moved to dismiss the petition because such plat was not filed.

V.

The notice served and published did not describe the same property referred to in the petition of the receivers.

The petition asked for the condemnation of a strip of land 25 feet wide, while the notice published, as well as that personally served on those so notified, described the land as a strip 18 feet wide; and the commissioners in their report considered the land taken as a strip 25 feet wide.

Manifestly, the court could not proceed to appoint commissioners, upon proceedings so irregularly brought. While the Consolidated Turnpike Company came into court in response to this notice, and Walter H. Taylor, trustee, also came, there were others, interested, as appears from the record, besides the Turnpike Company and the trustee, and the latter being in court merely in a fiduciary capacity,

as trustee for the bondholders, it was not within his power to waive any rights of any individual bondholder, but his power and authority were limited to the terms and conditions of the deed of trust under which he was acting, which made no provision for his appearance or voluntary remission of the rights of the bondholders.

Under the present state of the law in this State, under the new constitutional provision with respect to damages, the report of the commissioners is not confined to reporting as to parties whose property is taken, but relates also to the parties whose property may be damaged by the proposed work, and in such proceedings as in the case at bar, condemning a strip of land along the entire way of the turnpike, the rights of abutting owners must necessarily be considered. The appropriation of a strip 18 feet wide as a part of a turnpike, might present a different situation from the appropriation of a strip 25 feet wide.

The objections now presented as assignments of error, and reasons why these proceedings should be set aside, were presented in the demurrer and answer, and written motion of Arthur W. Depue, and Walter H. Taylor, trustee, who appeared in the lower court. The said Depue and Taylor, trustee, however, when they again appeared in court three years after the institution of the proceedings, and moved the court to confirm the report of the commissioners allowing the sum of \$57,200 as an award for the property proposed to be

- 13 taken, asked leave to withdraw all of said objections, realizing that said objections presented a serious bar to their enjoyment of their proportion of this enormous award.

Second Assignment of Error.

Three years after the filing of the report of the commissioners, Arthur W. Depue, who had theretofore appeared in opposition to these proceedings, notified the Norfolk and Ocean View Railway Company that he would move for confirmation of the commissioners' report, or so much thereof as fixed the award at \$57,200. Whether the receivers, who had instituted these proceedings, were notified of this motion, does not appear. In response, however, to the notice served upon it, the Norfolk and Ocean View Railway Company, by its counsel, appeared and filed its motions to vacate and dismiss the proceedings theretofore had—appearing specially for this purpose, and for no other (see Bill of Exceptions No. 1, p. 96), giving as grounds for vacating and dismissing said proceedings substantially the same objections as presented by Arthur W. Depue and other parties on the first hearing of the petition, which objections were based upon the fatal defects in the petition and want of jurisdiction in the court to entertain the petition of receivers of the Federal court. The court overruled the motion of the Norfolk and Ocean View Railway Company; to which action of the court the Norfolk and Ocean View Railway Company excepted. That the irregularities and objections so brought to the attention of the court were fatal, and such as the court should at any and all times consider, seems manifest; and the action of the court in overruling the motion of the

Norfolk and Ocean View Railway Company is assigned as additional ground of error.

Third Assignment of Error.

In response to the notice as aforesaid, the Norfolk and Ocean View Railway Company filed the written motions contained in Bills of Exception Nos. 1 and 2 (pp. 96-98); and upon the motions being overruled, counsel for the Norfolk and Ocean View Railway Company participated in the argument upon the motion of Depue to confirm said report. The court, notwithstanding the statement contained in the written motion contained in Bill of Exception No. 1, that the Norfolk and Ocean View Railway Company appeared specially, held that by the act of the counsel of the Norfolk and Ocean View Railway Company in participating in the argument on Depue's motion to confirm, the said Norfolk and Ocean View Railway

14 Company, though it had never appeared as a plaintiff, or been cited as a party defendant, became a party to the proceedings against whom a judgment might be had. To this action of the court the Norfolk and Ocean View Railway Company excepted, and now insists that said action of the court constituted a further ground of error, to the prejudice of said Norfolk and Ocean View Railway Company.

Fourth Assignment of Error.

The Norfolk and Ocean View Railway Company as an additional ground for its motion to dismiss and discontinue said proceedings, directed the court's attention to section 1105-f of Pollard's Code, sub-division 27, which provides, in part, as follows:

"If, in any such proceedings, the amount or amounts ascertained by the commissioners as aforesaid, be not paid to the party entitled thereto, or into court, within three months from the date of the filing of the report of the commissioners, the proceedings shall *ipso facto* be vacated and dismissed."

It will be recalled that from the filing of the report in May, 1906, until the spring of 1909, there was no action taken upon the award, and no money paid into court, or to any party. Under the section referred to the proceedings were vacated, and the court should have entertained the motion of the Norfolk and Ocean View Railway Company to discontinue, and have proceeded no further in the matter. This was the law relating to this subject when the condemnation proceedings here in question were instituted, and was the law when the commissioners' report was filed in May, 1906. It is true that the General Assembly amended this provision of the condemnation act, which amendment, however, did not take effect until after the report of the commissioners was filed.

The action of the court in failing to recognize that these proceedings were vacated by the failure to pay the amount of the award, within the time designated, and discontinue the same, is assigned as further ground of error.

Fifth Ground of Error.

The action of the court in entering the order of the 6th day of August, 1909, confirming, in part, the report of the commissioners, was plainly erroneous, because of the many errors and imperfections in these proceedings, the insufficiency of the petition, and
 15 other errors to which attention has already been called; but for additional reasons apparent upon the face of the report, to-wit:

(1) The report describes the land to be condemned, in part, as a strip 25 feet wide; while the notice published, and the notice personally served, describes the same strip as 18 feet wide.

(2) The report of the commissioners is not co-extensive with the order and direction of the court appointing the commissioners. The petition of the receivers (p. 7) states that the interest or estate "which is desired and intended to be acquired, is a fee simple estate, and the interest of all persons and corporations having any interest in, or lien or claim against, whether in the shape of deed of trust, mortgage or other lien of record, or whether the same be a reversionary interest." On the other hand, the report of the commissioners is apparently a report merely as to the value of the estate of parties having encumbrances. The report says (p. 66): "The interest in the above described land proposed to be taken is the interest of all persons or corporations having any interest or claim against, or lien upon the land, whether said interest in, or claim against, or lien upon the land be by deed of trust, mortgage or other lien of record." Their report leaves no question in regard to their intention, when they say (p. 67): "We are of opinion, and do ascertain, that for the interest or estate of all persons or corporations having any interest in, or claim against, or lien upon said land, whether said interest or estate, claim or lien be by deed of trust, mortgage or other lien of record, and for the other property of said owners," &c.

In other words, the report of the commissioners is plainly limited to an ascertainment of the value of the interest secured by mortgage or deed of trust; while the petition asks for the ascertainment of the value of the fee simple interest.

That the said commissioners did not consider and report upon the fee simple interest which the petition sought to acquire, is also borne out by the statement in their report which expressly says:

"We have not considered or passed upon the value of the reversionary interest in tract No. 2, as to which Diana Talbott, Mary T. Ruffin, Elizabeth W. Talbott, Minton W. Talbott and Thomas W. Talbott were summoned in these proceedings, because said interest therein is not to be taken from them, or any of them, under the order of the court entered herein. And we further report that we have not considered, estimated or passed upon the damages that will or may accrue to, or be sustained by said Thomas Talbott or Minton W.

16 Talbott, or either of them, as to the adjacent land, by reason of the location, construction, maintenance, or proper and reasonable operation of the works of the plaintiff, in this condemnation proceeding."

The court did not relieve the commissioners from making a report in accordance with the statute, nor did it have jurisdiction to do so had it attempted it. The commissioners in their report have undertaken to estimate the value of a lien or mortgage interest, in direct violation of the order of the court appointing them, and in failing to report as to the property or estate of the Talbotts and others, have utterly failed to meet the requirements of the statute.

It is apparent that under this report, the Norfolk and Ocean View Railway Company, if it must pay the award and accept the benefits of it, would pay this enormous sum of money and secure a very limited title or interest, if any at all; while it would be entitled, in a proper condemnation proceeding, to secure a fee simple title and a release against all parties who might claim damages by reason of the construction and operation of the work proposed.

For these reasons the commissioners' report was plainly erroneous, and should have been set aside in toto.

Sixth Assignment of Error.

The report of the commissioners, as has been stated, fixed the compensation for the interest taken, as follows (p. 80):

"If valued as of the 1st day of May, 1902..... \$5,000.00

will be just compensation.

If valued as of the date of this report, without improve-
ments \$6,200.00

will be just compensation.

For the land, with improvements.....	\$7,200.00
For the steel rails.....	15,000.00
For the railroad ties.....	1,250.00
For the poles.....	1,250.00
For the overhead construction.....	2,500.00
For the machinery and power house.....	25,000.00
For the building on tract No. 2.....	5,000.00

Making a total of.....\$57,200.00

will be just compensation.

17 We would further report that the evidence before us shows that the steel rails, overhead wires and machinery in the power house could be removed from the premises, without interfering with the freehold."

Upon this report, the court, by its order of the 6th day of August, 1909, confirmed the award of \$57,200.00, striking out the alternative award as not material.

The court, if it had jurisdiction to act upon the report, should have confirmed the award which did not include the value of the

improvements placed upon the property by the Bay Shore Terminal Company with the consent of the Consolidated Turnpike Company.

It will be recalled that at the time of the institution of the condemnation proceedings, the receivers of the Bay Shore Terminal Company were in undisturbed possession of the property in question, under the grant from the Consolidated Turnpike Company. There had been no default by the Consolidated Turnpike Company under the deed of trust to Walter H. Taylor, trustee, and the said Consolidated Turnpike Company, or rather the Bay Shore Terminal Company through it, was in possession, and continuing in possession, as authorized under said deed. The right to the possession by the Bay Shore Terminal Company was complete as against the trustee, and all the world. The improvements placed upon it were not put upon the property in an act of trespass, but under a license and authority granted by the Turnpike Company, and with the approval of (certainly without any objection by) the trustee, who had received the consideration for the grant of the license by the Turnpike Company. That improvements placed upon the property should not be considered in a proceeding of this character instituted by the party making the improvements under license, is recognized by an overwhelming weight of authority. This question is considered by Chief Justice Fuller in *Searl v. School District*, 133 U. S. p. 561, and decided by him in accordance with our contention. In that case the premises were acquired for a public school house. The District Board had knowledge of the issuing of a patent covering the property; they had purchased the claim of another party having adverse title, believing it to be the better title; a building constructed at great expense was completed; subsequently, the title of the School District was defeated, and condemnation proceedings were commenced to acquire the title of which the School District had knowledge, but as to which they were advised that the one acquired by them was superior. The Chief Justice said:

18 "The maxim *quicquid plantatur solo, solo cedit*, is not of universal application. Structures for the purposes of trade or manufacture, and not intended to become irrevocably part of the realty, are not within the rule, *Van Ness v. Pacard*, 2 Pet. 137; nor is it applicable where they are erected under agreement or by consent, the presumption not arising that the builder intended to transfer his own improvements to the owner. And courts of equity, in accord with the principles of the civil law, when their aid is sought by the real owner, compel him to make allowance for permanent improvements made *bona fide* by a party lawfully in possession under a defective title. Story Eq. Jur., sec. 1237.

"The civil law recognized the principle of reimbursing to the *bona fide* possessor the expense of his improvements if he was removed from his possession by the legal owner, by allowing him the increase in the value of the land created thereby. And the betterment laws of the several States proceed upon that equitable view. The rights of recovery, where the occupant in good faith believes himself to be the owner, is declared to stand upon a principle of natural justice and equity, and such laws are held not to be uncon-

stitutional as impairing vested rights, since they adjust the equities of the parties as nearly as possible according to natural justice; and in its application as a shield of protection, the term 'vested rights' is not used in any narrow sense, but as implying a vested interest of which the individual can not be deprived arbitrarily without injustice. The general welfare and public policy must be regarded, and the equal and impartial protection of the interests of all. Cooley, Cons. Lim. 356, 386."

In concluding his opinion, the learned Chief Justice, speaking for the court, said:

"In our judgment the technical rule of law invoked to sustain the defendant's contention that he owned the school house, was inapplicable, and the value of the improvements could not be justly included in the compensation. Numerous well considered decisions of the State courts announce the same result."

Lewis, in his work on Eminent Domain, which is the leading textbook on this subject, says:

"Persons and corporations vested with the power of eminent domain have no more right than natural persons to enter upon private property before taking the steps prescribed by law to obtain possession. If they do, the owner may have his common law remedies of trespass or ejectment, or he may resort to equity and enjoin the invasion or use of his land. But in all such cases the persons making the entry may by proper proceedings condemn the property entered upon, and so perfect their right to its possession and enjoyment. The question now to be considered is whether in proceedings for this purpose the owner of the land is entitled to the value of the improvements which have been put upon it by the party condemning it. If the entry has been made by consent of the owner, express or implied, it is clear that the owner should not have the value of what has been put upon the land. He has let the condemning party in for the very purpose of making these improvements, and with the expectation that the right permanently to enjoy the land with the improvements, would be acquired by agreement or otherwise. The cases all agree upon this point, without much discussion of principles. In such cases the award includes all damages from the entry. Such consent may be given by the life tenant, so as to bind the reversioner, or by the mortgagor in possession, so as to bind the mortgagee. If the owner brings a suit to recover the just compensation, such a suit operates as a consent to the occupation, which relates back to the entry, and upon the principles above cited the value of the works put upon the property must be excluded in estimating the damages.

"When the entry is made without consent, express or implied, the case presents more difficulties, but it seems clear, both upon reason and authority, that the owner, in a proceeding to ascertain the just compensation, is not entitled to the value of works placed upon the property, though without right, for the purpose of adapting the property to the public use intended. The few cases which hold to the contrary proceed upon a strict and technical application of the

rule of common law, that structures placed upon the land by a trespasser become a part of the realty and can not be recovered. In a common law proceeding this rule of law would perhaps apply, but the proceedings to ascertain the just compensation to be made for property taken for public use is not a common law proceeding."

Mills, in his work on Eminent Domain, lays down the same rule; and a writer on this subject in Cyc. of L. & P., Vol. 15, states the rule, supported with authorities from many States, as follows:

"Where a corporation, vested with the power of eminent domain, enters upon land without the consent of the owner, express or implied, and places improvements thereon, and subsequently institutes proceedings to condemn the same land, the common law rule that a structure erected by a tortfeasor becomes a part of the land, does not apply; and the owner is not entitled to the value of the improvements thus wrongfully erected."

See also to the same effect:

10 Am. & Eng. Ency. Law, p. 1159.

4 Sutherland Damages, 3 Ed., sec. 1076.

3 Elliott Railroads, sec. 998.

The rules as stated by the learned Chief Justice and the text-writers referred to, seems to be universally accepted, as will be seen from the numerous cases following:

Alabama:

Jones v. New Orleans, &c. R. R. Co., 70 Ala. 227.

Arkansas:

Newgass v. St. Louis, &c. R. R. Co., 54 Ark. 140.

California:

California, &c. R. R. Co. v. Armstrong, 46 Cal. 85.

Albion, &c. R. R. Co. v. Heiser, 84 Cal. 435.

San Francisco, &c. R. Co. v. Taylor, 86 Cal. 246; 24 Pac. Rep. 1027.

Florida:

Jacksonville, &c. R. Co. v. Adams, 28 Fla. 631, 10 So. Rep. 465.

Illinois:

Chicago, &c. R. Co. v. Goodwin, 111 Ill. 273, 53 Am. Rep. 622.

Chicago, &c. R. Co. v. Vaughan, 69 N. E. 117-18.

Ellis v. Rock Island, &c. R. Co., 125 Ill. 82.

Iowa:

Daniels v. Chicago, &c. R. Co., 41 Iowa, 52.

Indiana:

Indiana, &c. R. Co. v. Allen, 100 Ind. 499.

McClary v. Jefferson School Township, 13 L. R. (U. S.) 417.

21 Kansas:

St. Louis, Kansas, &c. R. Co. v. Nye, 61 Kans. 394, 48 L. R. A. 241.

Cohen v. St. Louis, &c. R. Co., 34 Kans. 158, 55 Am. Rep. 158.

Atchison, &c. R. Co. v. Morgan, 42 Kans. 23, 21 Pac. 809.

Ritchie v. Kansas, &c. R. Co., 55 Kans. 36, 39 Pac. 718.

Maryland:

Northern Central R. Co. v. Canton Co., 30 Md. 347.

Michigan:

Toledo, &c. R. Co. v. Dunlap, 47 Mich. 456, 11 N. W. 271.

Morgan's Appeal, 39 Mich. 675.

Minnesota:

Grove v. St. Paul, &c. R. Co., 26 Minn. 60.

Mississippi:

Canton, &c. R. Co. v. French, 68 Miss. 22, 8 So. 512.

Louisville, &c. R. Co. v. Dickinson, 63 Miss. 380, 56 Am. Rep. 809.

North Carolina:

N. C. R. R. Co. v. Deal, 90 N. C. 110.

Burgess v. Clark, 13 Iredell Law, 109.

New Jersey:

Price v. Weehawken Ferry Co., 31 N. J. Eq. 31.

North Hudson County R. Co. v. Bootoom, 28 N. J. Eq. 450.

New York:

Re Norwood, &c. R. Co., 47 Hun. 489.

Nebraska:

Omaha Bridge & Terminal R. Co. v. White, 94 N. W. 513.

Oregon:

Oregon Ry. & Nav. Co. v. Mosier, 14 Ore. 519.

Pennsylvania:

Justice v. Nesquehoning Valley R. Co., 87 Pa. St. 28.

22 Texas:

Presslin v. Sabine, &c. R. Co., 70 Tex. 575, 7 S. W. 825.

Texas &c. R. Co. v. Hays, 3 Tex. Cir. App. 79.

Utah:

Denver, &c. R. Co. v. Stonecliffe, 4 Utah, 231, 7 Pac. 530.

Chase v. School District, 8 Utah, 231.

Vermont:

St. Johnsbury, &c. R. Co. v. Willard, 61 Vt. 134, 2 L. R. A. 528.

Washington:

Seattle, &c. R. Co. v. Corbett, 22 Wash. 189, 60 Pac. 127.
Bellingham, &c. R. Co. v. Stroud, 44 Pac. 140.

Wisconsin:

Lyon v. Green Bay, &c. R. Co., 42 Wis. 538.
Kennedy v. Milwaukee & St. Paul R. Co., 22 Wis. 581.

United States:

Searl Case, 133 U. S. 561.
Skinner v. Ft. Wayne, &c. R. Co., 99 Fed. 465.

The Lake case, 105 Va. 311, has been recited as holding a different view. That case, however, does not present the same issue as the one in the case at bar. It will be recalled that the parties in controversy in that case together fought out the title in ejectment proceedings, and the Lakes had recovered, under direction of this court, the title to the property on which the improvements of the railway company were placed, including all of the improvements, of course. It was subsequent to the conclusion of the ejectment proceedings that the condemnation proceedings were instituted by the railway. In the case at bar not only was there no recovery by the parties now claiming, or asking for the value of all the improvements, but the railway company was in rightful and undisturbed possession.

But, if the commissioners were right in taking into consideration the improvements, as becoming a part of the freehold, it was plainly error for them to consider such property as had been put on by the Bay Shore Terminal Company, or the receivers, which the commissioners themselves report as property not affixed to the freehold so as to become a part thereof. The overhead construction, consisting of wires, which could not be considered as so attached to the freehold as to become a part thereof, were put in the valuation of \$2,500.00 and the machinery in the power house, all of which the commissioners report could be removed "without interfering with the freehold," they have considered in their estimate at \$25,000.00.

The action of the court in confirming the report of the commissioners, which requires the payment of fifty-odd thousand dollars for property which the Norfolk and Ocean View Railway Company is entitled to as successor of the Bay Shore Terminal Company, is assigned as ground of error, from which your petitioner asks relief.

Seventh Assignment of Error.

The order or decree of the 6th day of August, 1909, directed the Norfolk and Ocean View Railway Company, within three months from the entry of said order, to deposit in some national bank of

the City of Norfolk, to the credit of the court in this cause, the sum of \$57,200.00. This action of the court is assigned as error:

(1) Because the said Norfolk and Ocean View Railway Company did not institute the proceedings; had not appeared as a party plaintiff, nor had it appeared or been made a party defendant against whom the judgment could be entered.

(2) Because there was no authority or warrant of law in the court to direct a judgment upon this award.

If the court had the power to put the Norfolk and Ocean View Railway Company in the place of the receivers of the Bay Shore Terminal Company as petitioners in these condemnation proceedings, yet there was no authority in the court to direct the payment of the award of the commissioners by the receivers, or by the Norfolk and Ocean View Railway Company. Our statutes with respect to the exercise of the power of eminent domain do not authorize a judgment or order against the petitioning party, except in a case where the money has been once paid into court, the title vested in the petitioners, and for good cause new commissioners have been appointed and a new award made. The petitioning party in condemnation, under our statute, until title has vested, may abandon the proceedings. As to this there can be no question.

Section 1105-f, sub-division 9 of Pollard's Code, provides that upon the return of the report the sum ascertained "may be paid to the persons entitled, or into court * * *. Upon such
24 payment, either to the person entitled thereto, or into court, and confirmation of the report, the title to the part of the land and to the other property for which such compensation is allowed, shall be absolutely vested in the company, in fee simple," &c.

The statute says the money "may be paid," and nowhere authorizes the court to direct that it shall be paid.

Sub-division 27 of this same section, as it stood prior to the amendment of 1906, clearly recognizes the right of the petitioners to abandon the condemnation proceedings, and provides that if the money be not paid, either to the party entitled, or into court, the proceedings shall be vacated and dismissed. The amendment to this section (Acts 1906; p. 452), provides that if the money is not paid into court within three months from the date of the filing of the report of the commissioners, "all proceedings shall, upon the motion of any defendant, be vacated and dismissed as to him, but not otherwise."

Independent of the statute it is universally recognized that until title has passed, the petitioners in condemnation proceedings may abandon the same. The court below may have been misled because of the fact that the receivers of the Bay Shore Terminal Company, or the Norfolk and Ocean View Railway Company as purchaser of the foreclosed property, were in possession of the property proposed to be condemned. If so, the court was unmindful of the fact that the possession by the receivers, or the Norfolk and Ocean View Railway Company, was not pursuant to the condemnation proceedings

but under the deed or agreement with the Consolidated Turnpike Company.

Lewis, in his work on Eminent Domain, paragraph 655, says:

"In considering the right to discontinue in any case, regard should first be had to the statute applicable to the case. In the absence of express statutory provisions it is generally held that where a party has instituted proceedings to condemn property, it may discontinue those proceedings at any time before confirmation of the report of the commissioners."

Eighth Assignment of Error.

It will appear from the record in this case that the confirmation of the award of the commissioners by the order of the 6th day of

August, 1909, was upon the motion of Arthur W. Depue, 25 and upon his motion alone. While it appears that Depue

had filed a demurrer, answer and motion in this cause, upon the hearing of the motion for the appointment of commissioners, said Dupue was not one who could appear and become a party to these proceedings. He was one of numerous bondholders represented by Walter H. Taylor, trustee. If his interest was entitled to representation in these proceedings, it was by Walter H. Taylor, trustee, representing Depue as well as numerous other bondholders; and the court erred in permitting said Depue to appear as a party in this cause and ask for confirmation of the report. See *Fisher v. P. & P. Co.*, 104 Va. 121.

This action of the court in entering the order upon the motion of said Depue, is assigned as additional ground of error.

For the foregoing and other reasons apparent from the record, your petitioner respectfully prays that a writ of error and supersedeas to said order or judgment of the 6th day of August, 1909, be granted to it; and that said judgment or order, as well as the judgment or order of the 14th day of April, 1906, may be reviewed and reversed.

NORFOLK AND OCEAN VIEW RAILWAY COMPANY.

By Its Attorneys, GRONER & TAYLOR,

**E. RANDOLPH WILLIAMS,
MUNFORD, HUNTON, WIL-
LIAMS & ANDERSON.**

I, E. Randolph Williams, an attorney practicing in the Supreme Court of Appeals of Virginia, do hereby certify that in my judgment there is error in the judgments or orders complained of in the foregoing petition, and that the same should be reviewed by the Court of Appeals of Virginia.

E. RANDOLPH WILLIAMS.

J. K.

Received October 28, 1909.

Appeal and supersedeas awarded. Bond \$500.00.

JAMES KEITH

- 26 In the Matter of B. W. LEIGH and J. A. C. GRONER, Receivers of the Bay Shore Terminal Company, Condemning an Interest in Land Whereof the Bay Shore Terminal Company, is Tenant of the Freehold.

VIRGINIA:

Pleas Before the Circuit Court of Norfolk County, at the Court-house of said County, on the 2nd Day of October, 1909.

Be it remembered, that heretofore, to-wit: In the clerk's office of said court, on the 3rd day of March, 1906, came B. W. Leigh and J. A. C. Groner, Receivers of the Bay Shore Terminal Company, and filed their petition in the matter of said B. W. Leigh and J. A. C. Groner, Receivers of the Bay Shore Terminal Company, condemning an interest in land whereof the Bay Shore Terminal Company is tenant of the freehold, in the words and figures following, to-wit:

To the Honorable Judge of the Circuit Court of Norfolk County, Virginia:

The petition of B. W. Leigh and J. A. C. Groner, Receivers of the Bay Shore Terminal Company, shows unto your honor the following case:

(1) The Bay Shore Terminal Company a corporation chartered and organized under the laws of the State of Virginia and authorized by its charter to condemn land for its uses.

(2) By a decree of the Circuit Court of the United States for the Eastern District of Virginia, rendered on the 9th day of October, 1903, B. W. Leigh, H. L. Page and J. A. C. Groner were appointed receivers for all and singular the property of the Bay Shore Terminal Company.

(3) By an order of said court entered on the 20th day of January, 1906, the said receivers were directed to proceed in the proper court or courts to institute condemnation proceedings for the purpose of acquiring title to a portion of the right of way of the Bay Shore Terminal Company, which portion of said right of way is hereinafter more fully described.

27 (4) By a decree entered in said court on the 7th day of February, 1906, H. L. Page was removed as receiver of said company, and B. W. Leigh and J. A. C. Groner continued as Receiver of the Bay Shore Terminal Company, with full power to act as such.

(6) Your petitioners further represent that the Bay Shore Terminal Company is authorized by its charter and the laws of the State of Virginia, to condemn land or other property, or any interest or estate therein for its purposes, and that the land which is hereinafter shown, as sought to be condemned by it in this proceeding, is wanted for the uses and purposes of said company in constructing maintaining and operating its said railroad.

(7) The land and the interest in which is sought to be condemned in this proceeding is situated in the County of Norfolk in the State of Virginia, and is shown on the plat hereinafter referred to, and is bounded and described as follows:

First. A strip of land twenty-five feet wide in the County of Norfolk, State of Virginia, lying on the west side of the road of the Consolidated Turnpike Company and extending the whole length of said road, from Tanner's Creek to the northern terminus of said turnpike.

Second. A lot or parcel of land in the County of Norfolk, Virginia, north of and adjoining Tanner's Creek and bounded and described as follows: Beginning at a point on the eastern line of the Toll Road, in Talbot's Line, marked "A" and running thence S. 72° 22' E. 142 feet thence S. 40° 30' E. to Tanner's Creek, and then beginning again at the starting point and running S. 10° 30' W. along said Toll Road, 315 feet, and thence S. 79° 29' E. to Tanner's Creek, and bounded on the east by Tanner's Creek.

Together with the perpetual right in said Bay Shore Terminal Company, its successors and assigns, to cross the turnpike of said Consolidated Turnpike Company with not more than two tracks, north of and near Tanner's Creek for the purpose of enabling the said Bay Shore Terminal Company to reach its car barns with its cars, from the said strip of land on the west from Tanner's Creek northwardly to a point near Ocean View.

(8) Your petitioners further represent and aver that the said Consolidated Turnpike Company, by its deed dated the 1st day of March, in the year 1902, and duly recorded, conveyed the property hereinbefore mentioned and described unto the Bay Shore Terminal Company, with general warranty and modern covenants of title, subject to two deeds of trust and one dated the 1st day of June, 1898, and duly recorded, from the Tanner's Creek Drawbridge Company to Walter H. Taylor, Trustee, in which the said Tanner's Creek Drawbridge Company conveyed, among other, the property hereinafter mentioned and described, to Walter H. Taylor, Trustee, in trust to secure certain coupon bonds therein described, aggregating the sum of twenty-five thousand dollars, upon the terms and conditions in said deed set forth, and the other dated the 2nd day of April, 1900, from the Consolidated Turnpike Company to Walter H. Taylor, Trustee, duly recorded, in which the Consolidated Turnpike Company conveyed among other, the property hereinbefore mentioned and described, to said Walter H. Taylor, Trustee, in trust to secure certain coupon bonds therein described, aggregating the sum of \$200,000.00, upon the terms and conditions in said deed set forth, of which said \$200,000.00 of bonds, \$26,000.00 were required to be held and are now held by the Consolidated Turnpike Company, as required by a resolution of said Consolidated Turnpike Company, for the purpose of meeting the said bonds aggregating \$25,000.00, issued by said Tanner's Creek Drawbridge Company, payment of which said \$25,000.00 of bonds had been assumed by the said Consolidated Turnpike Company when it acquired the property of the Tanner's Creek Drawbridge Company.

In said deed from the Consolidated Turnpike Company to the Bay Shore Terminal Company aforesaid, it was expressly agreed and understood that the said Consolidated Turnpike Company would use the bonds and stock of the Bay Shore Terminal Company, delivered to it under said conveyance for the purpose of securing a release of each of said mortgages as to the land hereinbefore referred to.

The said Consolidated Turnpike Company has failed to secure the release of either of said deeds, and the same are still outstanding and unreleased as to said land hereinbefore referred to, constituting a lien thereon ahead of and prior to the title of the Bay Shore Terminal Company thereto.

Said bonds are coupon bonds, payable to bearer, and your petitioners do not know who are the holders of the same, nor any portion thereof, at this time, nor have they been able after the exercise of due diligence, to ascertain whether the holders and owners thereof are citizens of the State of Virginia or not.

29 A copy of the deed from Consolidated Turnpike Company to the Bay Shore Terminal Company is herewith filed marked Exhibit A, and prayed to be considered as a part of this petition.

The said parcel of land No. 2 hereinbefore described, was conveyed to the Indian Poll Drawbridge Company, predecessor in title, as to said parcel of land, to the Consolidated Turnpike Company, by William H. Talbot, by his deed dated the 15th day of May, 1851, in which said deed it was expressly provided that if the said company should abandon or cease to keep in use its bridge, for a space of three years, or should the corporate privileges of said company in any manner cease or be forfeited the said parcel of land of nearly three acres should ipso facto, thereupon revert to and become the property of said William H. Talbot, his heirs or assigns. The said William H. Talbot is dead, and his heirs at law are: Thomas Talbot, Minton W. Talbot, Diana Talbot, Elizabeth W. Talbot, Mary C. Ruffin, wife of — Ruffin.

Neither the said Indian Poll Bridge Company nor its successors in title have done or failed to do any of the acts recited in said deed, upon which the title to said property should revert to the heirs of said William H. Talbot, but your petitioners are not advised as to what interest the said heirs of William H. Talbot now have in said property, and make the said heirs of said Talbot parties to this proceeding, for the purpose of condemning any interest which they, or any or either of them, may have in said property.

(9) Your petitioner set forth as additional material facts in this petition, as required by law, the following:

That the interest or estate in said land which is desired and intended to be acquired, is a fee simple estate, and the interest of all persons and corporations having any interest in, lien or claim against whether in the shape of deed of trust, mortgage, or other lien of record, or whether the same be a reversionary interest, and that your petitioners have not been able to agree upon the terms of the purchase of said fee simple interest in or fee simple estate in

said land, by reason of the facts set out in paragraph eight of this petition.

(10) A plat of said property, with a profile showing the cuts and fills, trestles and bridges, and a memorandum showing a description of the property sought to be taken, and the names of the persons interested therein, are attached hereto and herewith filed in the clerk's office of the Circuit Court of the County of Norfolk, Virginia, and are prayed to be taken as a part of this petition.

30 (11) Your petitioners therefore pray that five disinterested freeholders, resident in the County of Norfolk, Virginia, may be appointed by the court for the purpose of ascertaining a just compensation for the interest in the aforesaid land, proposed to be condemned and taken by your petitioners for the purposes aforesaid, and of awarding damages, if any, resulting to the adjacent property of the owner or the property of any other person, beyond the peculiar benefits that will accrue to said properties, respectively, from the construction and operation of the petitioners' works; that such other proceedings may be had in the premises as conform to law, and your petitioners also ask for such other and general relief as the court may deem proper to award in the premises.

B. W. LEIGH,
J. A. C. GRONER,

Receivers of Bay Shore Terminal Company.

We, the undersigned, Receivers of the Bay Shore Terminal Company, do hereby make oath that the facts stated in the above petition and the memorandum thereto attached, are true, to the best of our knowledge and belief.

B. W. LEIGH,
J. A. C. GRONER,
Receivers.

VIRGINIA,

City of Norfolk, To wit:

This day personally appeared B. W. Leigh and J. A. C. Groner, Receivers of the Bay Shore Terminal Company, and make oath that the statement contained in the above petition and in the memorandum attached thereto, are true, to the best of their knowledge and belief.

Witness my hand this the 3rd day of March, 1906.

GERTRUDE BARBREY,
Notary Public.

My commission expires July 12th, 1906.

This memorandum and the accompanying plat and profile, are filed by the said B. W. Leigh and J. A. C. Groner, Receivers of the Bay Shore Terminal Company, in the Clerk's Office of the
31 Circuit Court of the County of Norfolk, Virginia, pursuant to the statute in such case made and provided for the exercise of the power of eminent domain.

(1) The accompanying plat of survey shows the property to be condemned by the Bay Shore Terminal Company for its uses and purposes in constructing, maintaining and operating its railroad.

(2) The description of the property, the interest in which it is proposed to be condemned, belonging to the corporation herein-after stated, is situated in the County of Norfolk, in the State of Virginia, as shown on the above mentioned plat, and is bounded and described as follows:

First. A strip of and twenty-five feet in width, in the County of Norfolk and State of Virginia, lying on the western side of the road of the Consolidated Turnpike Company, and extending the whole length of said road, from Tanners Creek to the northern terminus of said turnpike.

Second. A lot or parcel of land in the County of Norfolk, Virginia, north of and adjoining Tanners Creek, and bounded and described as follows: Beginning at a point on the eastern line of the Toll Road, in Talbot's line, marked A, and running thence S. $72^{\circ} 22'$ E. 142 feet; thence S. $40^{\circ} 30'$ E. to Tanners Creek, and then beginning again at the starting point and running S. $10^{\circ} 30'$ W. along the said Toll Road, 315 feet, and thence S. $79^{\circ} 29'$ E. to Tanners Creek, and bounded on the east by Tanners Creek.

Together with the perpetual right in said Bay Shore Terminal Company, its successors and assigns to cross the Turnpike of the said Consolidated Turnpike Company with not more than two tracks, north of and near Tanners Creek for the purpose of enabling the said Bay Shore Terminal Company to reach its barns with its cars, from the said strip of land on the west extending from Tanners Creek northwardly to a point near Ocean View.

(4) The Bay Shore Terminal Company, a corporation duly incorporated under the laws of the State of Virginia, and having its principal office in the City of Norfolk, in said State; Walter H. Taylor, Trustee under two deeds of trust, one from Tanners Creek Drawbridge Company, dated the 1st day of June, 1898, and the other from the Consolidated Turnpike Company dated the 2nd day of April, 1900, and the holders of the bonds secured in said deeds of trust, respectively, and the parties secured under said deeds of trust, Thos. Talbot, M. W. Talbot, Diana Talbot, Elizabeth W. Talbot and Mary C. Ruffin, wife of — Ruffin, are the owners of, or interested in, the property title to which, or an interest in which is sought to be acquired in this proceeding.

32 (5) The estate to be condemned is a fee simple estate in said property.

B. W. LEIGH,
J. A. C. GRONER,

Receivers of Bay Shore Terminal Company.

Subscribed and sworn to before me, this 3rd day of March, 1906.

GERTRUDE BARBREY,
Notary Public.

In the Circuit Court of the United States for the Eastern District of Virginia.

CHAS. E. FINK, Plaintiff,

v.

BAY SHORE TERMINAL COMPANY and Another, Defendants.

This cause came on this day to be again heard, upon the papers formerly read; and,

It appearing to the court, from the report of Special Master R. T. Thorp, that the Bay Shore Terminal Company has never acquired title to a portion of its right of way and to the property upon which its power-house is located.

The court doth adjudge, order and decree that B. W. Leigh, H. L. Page and J. A. Groner; receivers, do proceed in the proper court or courts to institute condemnation proceedings for the purpose of acquiring title to said property.

And said receivers are hereby authorized to take any and all necessary steps to institute and conduct said condemnation proceedings to as speedy a determination as possible.

[SEAL.]

EDMUND WADDILL, JR.,
U. S. Judge.

January 20th, 1906.

A Copy.

Teste:

D. A. KELSEY,
Deputy Clerk.

33 To whom it may concern:

You are hereby notified that B. W. Leigh and J. A. C. Groner, Receivers of the Bay Shore Terminal Company will on the — day of —, 1906, apply to the Circuit Court of the County of Norfolk, Virginia, at the courthouse of said County of Norfolk, Virginia, for the appointment of commissioners to ascertain what will be a just compensation for the interest of all persons or corporations having any interest in or claim against, or lien upon, either by deed of trust, mortgage or other lien of record, or any reversionary interest, in certain land, with the appurtenances thereto, in the County of Norfolk and hereinafter described, and of which the Bay Shore Terminal Company is tenant of the freehold, and which said interest is proposed to be condemned for the uses of said Bay Shore Terminal Company, and to award damages, if any, resulting to the adjacent or other property of the owner of said strip of land, or to the property of any other person, beyond the peculiar benefits that will accrue to the said properties, respectively, from the construction and operation of the works of said company.

The said land, with its appurtenances, is situated in the County of Norfolk, Virginia, and is shown upon the plat hereinafter referred to, and bounded and described as follows:

1. A strip of land eighteen feet wide, in the County of Norfolk, Virginia, lying on the west side of the road of Consolidated Turnpike Company and extending the whole length of the said road, from Tanners Creek to the northern terminus of said turnpike or road.

2. A lot or parcel of land in the County of Norfolk, north of and adjoining Tanners Creek, and bounded and described as follows: Beginning at a point on the eastern line of the Toll Road, in Talbot's Line, marked A, and running thence S. 70° 22' E. 142 feet; thence S. 40° 30' E. to Tanners Creek, and thence beginning again at the starting point and running S. 10° 30' W. along said Toll Road 315 feet, thence S. 79° 29' E. to Tanners Creek, and bounded on the east by Tanners Creek.

Together with the perpetual right in said Bay Shore Terminal Company, its successors and assigns, to cross the turnpike of the Consolidated Turnpike Company, with not more than two tracks, north of and near Tanners Creek, for the purpose of enabling the said Bay Shore Terminal Company to reach its car barns with its cars, from said strip of land on the west extending from Tanners Creek northwardly, to a point near Ocean View.

34 A plat of the property, a profile and description thereof, and a petition for the ap-ointment of commissioners have been filed in the Clerk's Office of the Circuit Court of Norfolk County, Virginia, as required by law.

B. W. LEIGH,
J. A. C. GRONER,

Receivers of Bay Shore Terminal Company.

Sergeant's Return.

Executed this 5th day of March, 1906, by serving copies hereof on M. Talbot, Thomas Talbot and Elizabeth H. Talbot, Walter H. Taylor and H. L. Page, President of the Bay Shore Terminal Company, the said H. L. Page being in and a resident of the City of Norfolk, at the time of such service where his place of business is and the principal office of said Bay Shore Terminal Co. is located.

J. F. LAWLER, *Sergeant.*
By C. L. QUINN, *Deputy.*

And on the 7th day of March, 1906, I served a copy hereof on H. L. Page, President of the Consolidated Turnpike Company, the said H. L. Page being in and a resident of the City of Norfolk at the time of such service, where his place of business is and the principal office of said Consolidated Turnpike Company, is located.

J. F. LAWLER, *Sergeant.*
By C. L. QUINN, *Deputy.*

In the Circuit Court of Norfolk County, on the 3rd day of March, 1906, the following order was entered:

It appearing to the judge of this court that B. W. Leigh and J. A. C. Groner, Receivers of the Bay Shore Terminal Company,

have filed a petition for the appointment of Commissioners for the purpose of condemning the interests of all persons and corporations having any interest in, lien or claim against, whether in the shape of deed of trust, mortgage, or other lien of record, or whether the same be a reversionary interest, in certain land in the County of Norfolk, Virginia, whereof the Bay Shore Terminal Company is tenant of the freehold; and has also filed, as required by law, a plat of survey of said land, with a profile and also description thereof; and,

It further appearing to the court that no newspaper is published in the County of Norfolk, the court doth, in accordance with the statute in such case made and provided, designate the Public Ledger, a newspaper published in the City of Norfolk, Virginia, as a newspaper in this State in which the notice shall be published of the application to be made by B. W. Leigh and J. A. C. Groner, receivers of the Bay Shore Terminal Company, for the appointment of commissioners for ascertaining a just compensation for the interest of all persons and corporations having any interest in or lien or claim against, whether in the shape of deed of trust, mortgage, or other lien of record, or whether the same be a reversionary interest, in certain land in the County of Norfolk, in the State of Virginia, whereof the Bay Shore Terminal Company is tenant of the freehold, and awarding damages, if any, resulting to the adjacent or other property of the owner of said land, or to the property of any other persons, beyond the peculiar benefits which will accrue to said properties, respectively, from the construction and operation of the works of said Bay Shore Terminal Company.

The following is the advertisement referred to in foregoing order:

Advertisement.

In the Circuit Court of Norfolk County, Virginia.

In the Matter of B. W. LEIGH and J. A. C. GRONER, Receivers of the Bay Shore Terminal Company, Condemning an Interest in Land Whereof Bay Shore Terminal Company is Tenant of the Freehold.

To whom it may concern:

You are hereby notified that B. W. Leigh and J. A. C. Groner, receivers of the Bay Shore Terminal Company, will on the 2nd day of April, 1906, apply to the Circuit Court of the County of Norfolk, Virginia, at the courthouse of said County of Norfolk, Va., for the appointment of commissioners to ascertain what will be a just compensation for the interest of all persons or corporations having any interest in or claim against, or lien upon, either by deed of trust, mortgage, or other lien of record, or any reversionary interest in certain land, with the appurtenances thereto, in the County of Norfolk and hereinafter described and of which the Bay Shore Terminal Company is tenant of the

freehold, and which said interest is proposed to be condemned for the uses of said Bay Shore Terminal Company, and to award damages, if any, resulting to the adjacent or other property of the owner of said strip of land, or to the property of any other person, beyond the peculiar benefits that will accrue to the said properties, respectively, from the construction and operation of the works of said company.

The said land, with its appurtenances, is situated in the County of Norfolk, Virginia, and is shown upon the plat hereinafter referred to, and bounded and described as follows:

1. A strip of land eighteen feet wide, in the County of Norfolk, Virginia, lying on the west side of the road of Consolidated Turnpike Company and extending the whole length of the said road from Tanner's Creek to the northern terminus of said turnpike or road.

2. A lot or parcel of land in the County of Norfolk, north of and adjoining Tanner's Creek, and bounded and described as follows: Beginning at a point on the eastern line of the Toll Road, in Talbot's line, marked A, and running thence S. 70 deg. 22 min. E. 142 feet, thence S. 40 deg. 30 min. E. to Tanner's Creek, and thence beginning again at the starting point and running S. 10 deg. 30 min. W. along said toll road 315 feet; thence S. 79 deg. 29 min. E. to Tanners Creek, and bounded on the east by Tanner's Creek.

Together with the perpetual right in said Bay Shore Terminal Company, its successors and assigns, to cross the turnpike of the Consolidated Turnpike Company, with not more than two tracks, north of and near Tanner's Creek, for the purpose of enabling the said Bay Shore Terminal Company to reach its car barns with its cars from said strip of land on the west extending from Tanner's Creek northwardly, to a point near Ocean View.

A plat of the property, a profile and description thereof and a petition for the appointment of commissioners have been filed in the clerk's office of the Circuit Court of Norfolk County, Virginia, as required by law.

B. W. LEIGH,
J. A. C. GRONER,

Receivers of Bay Shore Terminal Company.

J. EDWARD COLE,
THOS. H. WILLCOX,

Counsel for the Receivers.

37 I, Harvey L. Wilson, editor of "The Public Ledger," a daily newspaper published in the City of Norfolk, State of Virginia, do certify that the advertisement hereto annexed, in the matter of B. V. Leigh and J. A. C. Groner, receivers of the Bay Shore Terminal Co. condemnation, has been published once a week for four successive weeks in said newspaper, commencing March 3rd, 1906.

Given under my hand this April 5th, 1906.

H. L. WILSON,
Editor Public Ledger.

Demurrer, Joinder and Order Overruling Demurrer, April 14th, 1906.

And the said Arthur W. Depue comes and says that the petition filed herein by B. W. Leigh and J. A. C. Groner, as receivers of the Bay Shore Terminal Company, is not sufficient in law.

NATH'L T. GREEN, *p. d.*

And the said petitioners, B. W. Leigh and J. A. C. Groner, receivers of the Bay Shore Terminal Company, say that the said petition is sufficient in law.

COLE, WILLCOX & TAYLOR, *p. q.*

In the Circuit Court of Norfolk County, on the 14th day of April, 1906, the following order was entered:

It seems to the court that the said petition is sufficient in law for the petitioners to have and maintain the same. Wherefore it is adjudged and ordered by the court that the demurrer of said Arthur W. Depue be overruled. And the defendant, Arthur W. Depue, now desiring to answer generally the said petition is allowed to do so.

The Answer of Arthur W. Depue to the Petition of B. W. Leigh and J. A. C. Groner, Receivers of the Bay Shore Terminal Company, Filed in the Above Entitled Proceedings.

Respondent, Arthur W. Depue, answers said petition and says:

1. Respondent says he is the owner of bonds of the aggregate value of \$90,000, secured by a deed of trust from the Consolidated Turnpike Company of Norfolk, Virginia, to Walter H. Taylor, trustee, a copy of which has been introduced in evidence, on the motion, to quash this proceeding and dismiss the petition to which this is an answer, heretofore made by respondent and a reference to said deed of trust is hereby made as a part of this answer and that the said deed of trust is an encumbrance and deed of trust on the land and is an interest which is sought to be condemned in the above entitled proceedings.

2. As to the first six paragraphs of said petition, numbered from one to six, inclusive, respondent knows nothing and calls for proof thereof.

3. Respondent says that the deed of trust aforementioned under which the bonds held by him are secured, is a mortgage on the land described in paragraph No. 7 of said petition.

4. As to the eighth paragraph of said petition, a copy of the deed of trust from the Consolidated Turnpike Company of Norfolk, Virginia, to the Bay Shore Terminal Company therein referred to filed with the petition as Exhibit "A" states the facts relative to the matters alleged in said paragraph 8 so far as known by this respondent, except that it is admitted that the bonds secured by the deed from the Consolidated Turnpike Company to Walter H. Taylor, trustee, are coupon bonds payable to bearer and that the deed of trust secur-

ing the same is still outstanding and unreleased and constitutes a lien on said land described in paragraph seven ahead of and prior to the title of the Bay Shore Terminal Company thereto. As to all the other matters alleged in said paragraph 8, the respondent knows nothing and calls for strict proof thereof.

5. As to paragraph 9, respondent says no effort has been made to agree with Walter H. Taylor, trustee, or with the other bondholders under the deed of trust aforementioned upon any terms of purchase of the interest of the said bondholders or said trustee in the property sought to be condemned.

6. As to paragraph 10, your respondent knows nothing of the correctness of the plats and profiles in said paragraph mentioned.

7. Further answering said petition your respondent says that the same ought not to be maintained for the following reasons:

a. Because said receivers have not the power under the law to institute and prosecute such a proceeding as this.

b. Because the petition filed herein is not verified by the proper officers designated by law for that purpose.

c. Because the memorandum herein does not give as required by law the residence of the owners of the property sought to be condemned herein.

39 d. Because the Consolidated Turnpike Company of Norfolk, Virginia, which executed the mortgage or deed of trust to Walter H. Taylor, trustee, hereinbefore referred to securing, along with other bonds, the bonds held by the said Arthur W. Depue as aforesaid, was and is a corporation possessing itself the power of eminent domain under the law and therefore said receivers could not take the property herein sought to be condemned by this proceeding and cannot institute this proceeding until after hearing all parties in interest, the State Corporation Commission shall certify that a public necessity or that an essential public convenience shall so require and shall give its permission thereto and that such certificate has never been given by the State Corporation Commission and the petition therein filed herein fails to show the grant of any such certificate by the State Corporation Commission.

e. Because the petition does not show as required by law in order to take property of the kind here sought to be condemned, that the taking of the same is essential to the purposes of the said receivers or the Bay Shore Terminal Company.

f. Because the petition herein is framed with the view and intention that the Bay Shore Terminal Company itself is entitled to and should share in the proceeds of any property condemned in this proceeding and thereby the petitioners herein are endeavoring to condemn property already belonging to the Bay Shore Terminal Company of which they are receivers.

g. Because under the notice published in this proceeding and on which this proceeding is based, a part of the property sought to be condemned is described as follows:

"A strip of land eighteen feet wide, in the County of Norfolk, Virginia, lying on the west side of the road of Consolidated Turnpike Company and extending the whole length of the said road,

from Tanner's Creek to the northern terminus of said turnpike or road."

Whereas in the petition filed in this proceeding said part of said property sought to be condemned is described as follows:

"A strip of land twenty-five feet wide, in the County of Norfolk, State of Virginia, lying on the west side of the road of Consolidated Turnpike Company and extending the whole length of said road, from Tanner's Creek to the northern terminus of said turnpike."

And therefore there is a variance between said published
40 notice and said petition.

And now having fully answered, etc.

ARTHUR W. DEPUE,

By Counsel.

NATH'L T. GREEN, *p. d.*

Be it remembered, that on the 5th day of April, 1906, on the first calling of this proceeding on the docket of this court and before any order whatsoever had been made or entered herein, Arthur W. Depue, the holder of bonds of the aggregate value of \$90,000, secured by the deed of trust from Consolidated Turnpike Company of Norfolk, Virginia, to Walter H. Taylor, trustee, hereinafter referred to and introduced in evidence on the hearing of this motion, appeared specially and moved this court to quash this proceeding and dismiss the petition of B. W. Leigh and J. A. C. Groner, receivers of the Bay Shore Terminal Company, filed herein upon the following grounds:

1. Because said receivers have not the power under the law to institute and prosecute such a proceeding as this.

2. Because the petition filed herein is not verified by the proper officers designated by law for that purpose.

3. Because the memorandum herein does not give as required by law the residence of the owners of the property sought to be condemned herein.

4. Because the Consolidated Turnpike Company of Norfolk, Virginia, which executed the mortgage or deed of trust to Walter H. Taylor, trustee, hereinbefore referred to securing, along with other bonds, the bonds held by the said Arthur W. Depue as aforesaid, was and is a corporation possessing itself the power of eminent domain under the law and therefore said receivers could not take the property herein sought to be condemned by this proceeding and cannot institute this proceeding until after hearing all parties in interest, the State Corporation Commission should certify that a public necessity or that an essential public convenience shall so require and should give its permission thereto and that such certificate has never been given by the State Corporation Commission and the petition herein fails to show the grant of any such certificate by the State Corporation Commission.

5. Because the petition does not show as required by law in order to take property of the kind here sought to be condemned,
41 that the taking of the same was essential to the purposes of the said receivers or the Bay Shore Terminal Company.

6. Because the petition herein is framed with the view and intention that the Bay Shore Terminal Company itself is entitled to and should share in the proceeds of any property condemned in this proceeding and thereby the petitioners herein are endeavoring to condemn property already belonging to the Bay Shore Terminal Company of which they are receivers.

7. Because, under the notice published in this proceeding and on which this proceeding is based, a part of the property sought to be condemned is described as follows:

"A strip of land eighteen feet wide, in the County of Norfolk, Virginia, lying on the west side of the road of Consolidated Turnpike Company and extending the whole length of the said road, from Tanner's Creek to the northern terminus of said turnpike or road."

Whereas in the petition filed in this proceeding said part of said property sought to be condemned is described as follows:

"A strip of land twenty-five feet wide, in the County of Norfolk, State of Virginia, lying on the west side of the road of Consolidated Turnpike Company and extending the whole length of said road, from Tanners Creek to the northern terminus of said turnpike."

And therefore there is a variance between said published notice and said petition.

Which said motion to quash this proceeding and dismiss the said petition of said receivers herein the court overruled, to which said action of the court in overruling said motion to quash this proceeding and to dismiss said petition, said Arthur W. Depue excepted and prays that this his bill of exceptions number one may be signed, sealed and made a part of the record herein, and the same is accordingly done. And the court doth certify that upon the hearing of said motions there was introduced in evidence the following deed which was admitted as a true copy of the deed from the Consolidated Turnpike Company of Norfolk, Virginia, to the Bay Shore Terminal Company.

(See copy deed marked A. W. D. No. 1.)

And that there was also introduced in evidence the following deed of trust from Consolidated Turnpike Company of Norfolk, Virginia, to Walter H. Taylor, trustee, which is hereinabove referred to.

(See copy deed of trust A. W. D. No. 2.)

And doth also certify that said petitioners offered to prove that B. W. Leigh, one of the receivers who made affidavit to said petition, was at that time a director of Bay Shore Terminal Company and J. A. C. Groner who also made affidavit to said petition was at that time secretary of said Bay Shore Terminal Company and said Arthur W. Depue admitted such to be true without formal proof thereof.

And the court doth further certify that the above was all the evidence introduced on this motion to quash and dismiss.

WM. N. PORTLOCK, [SEAL.]

Judge of the Circuit Court of Norfolk County, Virginia.

In the Circuit Court of Norfolk County, on the 14th day of April, 1906, the following order was entered:

This day came, in his own person, Minton W. Talbot, defendant, individual owner of a part of the tract No. 1, designated as "a strip of land, &c.," and asked leave of the court to enter a special appearance, which leave being granted, the said Minton W. Talbot moved the court to dismiss the proceeding so far as it related to the said tract No. 1, upon the following grounds:

1. Because the court has no jurisdiction, since under Virginia Law Federal Receivers have no authority to condemn land.

2. Because the court has no jurisdiction, since the notice as served upon him and as advertised does not correspond with the language of the petition as to the width of the strip of land to be taken; in that the notice as served and advertised asks for the right to condemn a strip eighteen feet wide, while the petition asks the right to condemn a strip twenty-five feet wide.

3. Because the court has no jurisdiction, since the proceeding in no wise conforms to law, inasmuch as he, the said Minton W. Talbot, owns individually a part of the said tract No. 1, and has a right under the law to expect that he shall receive a separate notice addressed to him or to the tenant of the freehold as to his area, individually, and that his separate individual ownership shall be condemned separately and apart from the property of all other persons, and that his lands shall not be commingled as in the
43 present case in an unintelligible manner with the land belonging to numerous other proprietors, in one and the same condemnation notice and proceeding.

4. Because the court has no jurisdiction, since no real or proper plat of survey, showing the quantity of land to be taken has been filed in the clerk's office or advertised in a properly addressed notice as required by law.

5. Because the court has no jurisdiction, since no effort has been made to agree on the terms of purchase with him, the said Minton W. Talbot, the owner of a definite interest in the land, who has always been in easy reach of the plaintiff and who is in no wise incapacitated to dispose of his said interest in the land, and who has always resided and continuously maintained an office in Norfolk City, as to the value and price of his said interest.

Which motion being so made, the said Minton W. Talbot doth offer evidence in support of and to prove the matters of fact therein stated, which offer of evidence the court doth reject and refuse to allow, and the court doth also overrule the said motion to quash the proceedings on the grounds above stated, to which action of the court in refusing to allow the introduction of evidence in support of said motion and in overruling the same the said Minton W. Talbot doth except.

The separate answer of Minton W. Talbot, a defendant, being an owner of a definite, separate and individual interest in a part of the tract of land, numbered one in the petition and constituting the right of way in use of the Bay Shore Terminal Company, to the petition of B. W. Leigh and J. A. C. Groner, receivers of the Bay Shore Terminal Company.

Reserving to himself the benefit of the many errors and irregularities in the said proceedings and in the said petition, plat, profile, &c.:

1. This respondent alleges that this court cannot entertain the petition of the said receivers, because in it they ask to take a strip of land twenty-five (25) feet wide, while the notices as served by them personally and by advertisement only state that they wish to condemn a strip eighteen (18) feet wide.

2. This respondent further alleges that this court cannot entertain the petition of the said receivers, because their proceedings do not conform to the requirements of the statute, inasmuch as the respondent,

owns independently and individually a part of (or at the least a present interest in a part of) the said tract of land

No. 1, and has a right under the law to expect that he or the tenant of his freehold shall receive a separate notice, addressed to him individually or to the tenant of the freehold of his said area, and that his said separate individual ownership shall be condemned separately and apart from the property of all other persons, and that the damages to the residue of his tract shall be assessed separately and apart from the damages occurring to all other persons, and that his lands shall not be commingled as in the present case in an unintelligible manner with the land belonging to numerous other owners, in one and the same condemnation notice and proceeding.

This respondent alleges that he has the full, free and complete fee simple title of record to the said property, viz., a part of the tract No. 1, twenty-five (25) feet wide and over twenty-five hundred (2,500) feet long; subject only to such inchoate rights as may have attached to the same in favor of the Tanners Creek Drawbridge Company or the Consolidated Turnpike Company, its successor, by virtue of certain condemnation proceedings started up or instituted by the Tanners Creek Drawbridge Company in 1898, which now stand on exceptions to the report of the commissioners and have not been confirmed.

The respondent alleges that in pursuance of the 1887 Code of Virginia, Section 1079 and the amended charter of the Tanners Creek Drawbridge Company (Acts 1898-9, p. 424), the said company could not acquire anything more than a right of way in the said property, and was not authorized to condemn the fee simple interest in the property.

The respondent is advised and so alleges that, the said condemnation proceedings never having been confirmed, he is, under the decision of the Court of Appeals of Virginia as set forth in 99 Va., p. 633, still the record owner in fee simple of the said land; and that even if these said condemnation proceedings had been confirmed,

he would still be entitled to a present, actual, existing right and interest in the property, being the difference between the right of way interest and the fee simple interest; which present, existing, actual interest would entitle him to the timber growing on the land, to anything of value found indigenous in or on the soil and would entitle him to prohibit the removal of the soil to fill up some distant marsh and so forth.

3. This respondent further alleges that this court cannot
45 entertain the petition of the said receivers, because no real or proper plat of survey, showing the quantity of land to be taken has been filed in the clerk's office or advertised as required by law. In further explanation of which the respondent alleges the following insufficiencies in the said alleged plat of survey of tract No. 1 (right of way):

(a) Because it is said to start at Tanners Creek, which is a variable and not a fixed point, as the banks of the creek vary from year to year, and no two surveyors could estimate them the same. There should have been some invariable landmark of greater or less permanency named as the starting point, such as a stob, stone, stump, tree or other object.

(b) Because the survey in no wise indicates the quantity of land carved from the remaining lands of the respondent as the law requires.

(c) Because it does not give any courses and distances, such as would enable a surveyor to calculate the area carved from his remaining lands. The law of Virginia requires that the condemnation statutes shall be strictly construed and pursued. 98 Va., p. 90.

4. The respondent further alleges that the court cannot entertain the petition of the said receivers, because he is entitled to an individual, separate right and interest in the property as above stated, which he has in no wise incumbered, and that being so possessed of the said right and interest in the said property, no attempt has been made by the plaintiffs to agree with him, the said respondent, as to the value or price and the terms of purchase of his said definite rights and interest in the land, although he has always been in easy reach of the plaintiffs and is in no wise incapacitated to dispose of his said right and interest in the land, and has always resided and continuously maintained an office in the City of Norfolk; that he has had no part in nor anything whatever to do with any mortgage or deed of trust placed upon its inchoate interest in the same land by any turnpike company or electric railway. The respondent is advised and so alleges that, no such effort having been made to agree on the price, this court has no jurisdiction to entertain these proceedings, and that it would be unlawful and unjust to allow the plaintiffs to drag him into court to defend these proceedings without having first attempted to agree with him as to the value of his separate, individual, unencumbered interest. And although this attempt to agree on the price need not appear of the face of these proceedings, yet if such attempt be not made, the court has no jurisdiction.

46 Wherefore this respondent prays that the said petition may be quashed and overruled and that he may be hence dismissed with his reasonable costs on this behalf expended.

MINTON W. TALBOT.

STATE OF VIRGINIA,

City of Norfolk, To wit:

I, Lucy A. Wright, a notary public for the corporation aforesaid, in the State of Virginia, do certify that Minton W. Talbot, whose name is signed to the above writing, personally appeared before me in my corporation aforesaid, and made oath that all facts stated in the foregoing answer were true to the best of his knowledge and belief.

Given under my hand this 13th day of April, in the year 1906.

LUCY A. WRIGHT,

Notary Public.

My commission expires August 5th, 1908.

Postscript.

The following is a summary of the Acts of Assembly, which give condemnation powers to the companies listed:

Indian Pole Drawbridge Co. and Tanners Creek Drawbridge Co., Acts 1850-1, p. 128; Acts 1852, p. 152; Acts 1857-8, p. 135; Acts 1865-6, p. 392. Acts 1897-8, p. 424.

Bay Shore Terminal Co., Acts 1899-1900, p. 755; Acts 1901, p. 41.

Be it remembered, that on the 14th day of April, 1906, Minton W. Talbot, defendant, individual owner of a part of the tract No. 1, designated as "a strip of land, &c.," came and asked leave of the court to enter a special appearance which leave being granted, the said Minton W. Talbot moved the court to dismiss the proceeding so far as it related to the said tract No. 1, upon the following grounds:

1. Because the court has no jurisdiction, since under Virginia Law Federal Receivers have no authority to condemn land.
2. Because the court has no jurisdiction, since the notice as served upon him and as advertised does not correspond with the language of the petition as to the width of the strip of land to be taken; in that the notice as served and advertised asks for the right to condemn a strip eighteen feet wide, while the petition asks the right to condemn a strip twenty-five feet wide.
3. Because the court has no jurisdiction, since the proceeding in no wise conforms to law, inasmuch as he, the said Minton W. Talbot, owns individually a part of the said tract No. 1, and has right under the law to expect that he shall receive a separate notice addressed to him or to the tenant of the freehold as to his area, individually, and that his separate individual ownership shall be condemned separately and apart from the property of all other persons, and that his lands shall not be commingled as in the present case in an unintelligible manner with the land belonging to numerous other proprietors, in one and the same condemnation notice and proceeding.
4. Because the court has no jurisdiction, since no real or proper plat of survey, showing the quantity of land to be taken has been filed in the clerk's office or advertised in a properly addressed notice as required by law.

5. Because the court has no jurisdiction, since no effort has been made to agree on the terms of purchase with him, the said Minton W. Talbot, the owner of a definite interest in the land, who has always been in easy reach of the plaintiff and who is in no wise incapacitated to dispose of his said interest in the land, and who has always resided and continuously maintained an office in Norfolk City, as to the value and price of his said interest.

Which motion being so made, the said Minton W. Talbot doth offer evidence in support of and to prove the matters of fact therein stated, which offer of evidence the court doth reject and refuse to allow, and the court doth also overrule the said motion to quash the proceedings on the grounds above stated, to which action of the court in refusing to allow the introduction of evidence in support of said motion and in overruling the same the said Minton W. Talbot excepted and accordingly prays that this his bill of exceptions No. 1, be signed and sealed and made a part of the record in due form.

WM. N. PORTLOCK. [SEAL.]

In the Circuit Court of Norfolk County, on the 14th day of April, 1906, the following order was entered:

This day came, in his own proper person, Minton W. Talbot, one of the joint defendants, as to the tract of land No. 2, fronting
48 on the eastern side of the road, whereon is located the power house and car barn of the plaintiff, and asked leave of the court to enter a special appearance, which leave being granted, the said Minton W. Talbot moved the court dismiss the proceeding so far as it related to the said tract of land No. 2, upon the following grounds:

1. Because the court has no jurisdiction, since under Virginia Law Federal Receivers have no authority to condemn land.

2. Because the court has no jurisdiction, since the charter of the Bay Shore Terminal gives it no authority to condemn land for a power house and car barn; and because furthermore the general law of Virginia only gives an electric railway authority to condemn a right of way and nothing else; and to allow condemnation in this case would be to take private property for private uses.

3. Because the court has no jurisdiction, since no real or proper plat of survey, showing the quantity of land to be taken has been filed in the clerk's office or advertised in a properly addressed notice as required by law.

4. Because the court has no jurisdiction, since no effort was made in advance of instituting these proceedings to agree as to terms of purchase with him the said Minton W. Talbot, the owner of a definite interest in the land, who has always been in easy reach of the plaintiff and is in no wise incapacitated to dispose of his said interest in the land, and who has always resided and continuously maintained an office in the City of Norfolk, as to the value and price of his said interest.

5. Because the court has no jurisdiction, since the said tract of land No. 2 is owned by different parties from tract No. 1, and should

be condemned separately and apart to itself, under a separate notice, &c.

Which motion being so made, the said Minton W. Talbot doth offer evidence in support of and to prove the matters of fact therein stated, which offer of evidence the court doth reject and refuse to allow, and the court doth also overrule the said motion to quash the proceedings on the grounds above stated, to which action of the court in refusing to allow the introduction of evidence in support of the facts stated in said motion and in overruling the same the said Minton W. Talbot doth except.

The answer of Minton W. Talbot, one of the joint defendants, as to the tract of land No. 2 fronting on the eastern side of the road, wherein is located the power house and car barn of the plaintiff, to the petition of B. W. Leigh and J. A. C. Groner, receivers of the Bay Shore Terminal Company.

Reserving to himself the benefit of the many errors, &c., in the petition:

1. This respondent denies the first statement in the petition that the Bay Shore Terminal Company is authorized to condemn land for its uses, if it is to be understood thereby that it claims the right to condemn land for all of its uses.

This respondent on the contrary alleges that neither its charter nor the laws of Virginia permit it to condemn land for a power house or car barn; and to allow them to do so would be to permit the condemning of private property for private uses; that they have no more right to condemn for such uses, than they would have to condemn an office building or dwelling for their motormen.

The charter of the Bay Shore Terminal Company (Acts 1899-1900, p. 755), authorized it "to construct and maintain depots, station houses, warehouses and docks and acquire by purchase or lease lands and sites for the purpose of maintaining parks, picnic grounds and so forth," but clause 2 of the said charter referring to its right to the exercise of eminent domain, merely states it may condemn "lands required for the rights of way of its tracks and the necessary stations and depots for its operation."

The general law of Virginia relating to electric railways, Code 1904, section 1294-i (3), (4) and (5) prescribes that they may contract for land for their many uses; but only permits them to condemn a right of way and nothing else.

2. This respondent denies absolutely the statement in clause 10 of the petition, which says that a plat of survey as required by law has been filed in the clerk's office. This respondent on the contrary alleges that this court cannot entertain the petition of the said receivers, because no real or proper plat of survey, showing the quantity of land to be taken has been filed in the clerk's office or advertised in a notice as required by law, Code 1904, p. 581-2; in further explanation of which this respondent alleges the following insufficiencies in the said alleged survey as detailed in the petition.

(a) Because it is said to start at a point marked A in Talbot's

line, whereas the said mark A has no actual or physical existence, and the starting point should have been some stationary physical object such as a stob, stone, tree, stump, or permanent landmark of some kind.

The said mark A is not shown on the blue print filed with the petition. Furthermore the line between this property and the adjacent Talbot property is an indeterminate quantity, having never been agreed on, defined or in any wise been determined and being still an open question.

50 (b) Because the land as indicated by the survey is a pentagon or of a five-sided figure; and even if the data furnished in the blue print and in the petition should be added to one another and taken conjointly, yet nevertheless there is one side of the said area on which neither course nor distance is given, and another adjacent side in which only the course is given, and that therefore no surveyor on earth can tell the area or contents of the said partial survey. The land is acreage and the area proposed to be taken is perhaps several acres.

(c) Because it does not furnish the quantity or area of the land proposed to be taken as the law directs.

3. This respondent further alleges that the court cannot entertain the petition of the said receivers, because he is entitled to an undivided reversionary interest either in the whole or in a one-half or in a one-fifth part of the said tract, numbered 2 in these proceedings, according as the will of his father, William H. Talbot, may be interpreted; that he has never incumbered or in any wise placed any liens on this interest; that he has this reversionary right as his own property or an interest in the same; that being so possessed of the said right and interest in this property, no attempt has been made by the plaintiffs to agree with him, the said respondent, as to the value or price and the terms of purchase of his said definite rights and interest in the land, although he has always been in easy reach of the plaintiffs and is in no wise incapacitated to dispose of his said interest and right in the land and has always resided and continuously maintained an office in the City of Norfolk; that he has had no part in nor anything whatever to do with any mortgage or deed of trust placed upon its interest in the same land by any turnpike company or electric railway.

This respondent is advised and so alleges that, no such effort having been made to agree on the price, this court has no jurisdiction to entertain these proceedings, and that it would be unlawful and unjust to allow the plaintiff to drag him into court to defend these proceedings without having first attempted to agree with him as to the value of his unencumbered interests. And although this attempt to agree on the price need not appear on the face of the proceedings, yet if such attempt be not made, the court has no jurisdiction.

4. This respondent further alleges that this court cannot entertain the said petition because the said receivers have not complied
51 with the law which directs that when more than one parcel of land is to be taken there shall be a separate plat of survey and description of each.

This respondent, in conclusion, would call attention to the fact after a diligent search he has not been able to find where the deed from the Consolidated Turnpike Company to the Bay Shore Terminal Company has ever been recorded; also to the fact that the road, 35 feet wide, between the right of way occupied by the Bay Shore Terminal Company and the said tract number 2, the Turnpike Company has a right in only five feet thereof in width, the remaining easterly thirty feet in width being a free road, as evidenced by its being so recognized in the 1851 deed of W. H. Talbot referred to in the petition, which was before the Indian Pole Company had turnpike rights and as further evidenced by the successful resistance to paying taxes thereon by the Tanner's Creek Drawbridge Company.

Wherefore this respondent prays that the said petition may be quashed and overruled and that he may be hence dismissed with his reasonable costs on this behalf expended.

MINTON W. TALBOT.

STATE OF VIRGINIA,

City of Norfolk, To-wit:

I, Lucy A. Wright, a notary public for the corporation aforesaid, in the State of Virginia, do certify that Minton W. Talbot, whose name is signed to the above writing, personally appeared before me in my corporation aforesaid, and made oath that all facts stated in the foregoing answer were true to the best of his knowledge and belief.

Given under my hand this 13th day of April, in the year 1906.

LUCY A. WRIGHT,
Notary Public.

My commission expires August 5th, 1908.

Be it remembered, that on the 14th day of April, 1906, Minton W. Talbot, one of the joint defendants, as to the tract of land No. 2, fronting on the eastern side of the road, whereon is located the power house and car barn of the plaintiff, came and asked leave of the court to enter a special appearance, which leave being granted, the said Minton W. Talbot moved the court to dismiss the proceeding so far as it related to the said tract of land No. 2, upon the following grounds:

52 1. Because the court has no jurisdiction, since under Virginia Law Federal Receivers have no authority to condemn land.

2. Because the court has no jurisdiction, since the charter of the Bay Shore Terminal gives it no authority to condemn land for a power house and car barn; and because furthermore the general law of Virginia only gives an electric railway authority to condemn a right of way and nothing else; and to allow condemnation in this case would be to take private property for private uses.

3. Because the court has no jurisdiction since no real or proper plat of survey, showing the quantity of land to be taken has been

filed in the clerk's office or advertised in a properly addressed notice as required by law.

4. Because the court has no jurisdiction since no effort was made in advance of instituting these proceedings to agree as to terms of purchase with him, the said Minton W. Talbot, the owner of a definite interest in the land, who has always been in easy reach of the plaintiff and is in no wise incapacitated to dispose of his said interest in the land and who has always resided and continuously maintained an office in the City of Norfolk, as to the value and price of his said interest.

5. Because the court has no jurisdiction, since the said tract of land No. 2, is owned by different parties from tract No. 1 and should be condemned separately and apart to itself, under a separate notice, &c.

Which motion being so made, the said Minton W. Talbot doth offer evidence in support of and to prove the matters of fact therein stated, which offer of evidence the court doth reject and refuse to allow, and the court doth also overrule, the said motion to quash the proceedings on the grounds above stated, to which action of the court in refusing to allow the introduction of evidence in support of the facts stated in said motion and in overruling the same the said Minton W. Talbot excepted and accordingly prays that this his bill of exceptions No. A, be signed and sealed and made a part of the record in due form.

WM. N. PORTLOCK. [SEAL.]

In the Circuit Court of Norfolk County, on the 14th day of April, 1906, the following order was entered:

This day came, in his own proper person, Thomas Talbot, defendant, individual owner of a part of the tract No. 1, designated as "a strip of land, &c.," and asked leave of the court to enter
53 a special appearance, which leave being granted, the said Thomas Talbot moved the court to dismiss the proceeding so far as it related to the said tract No. 1, upon the following grounds:

1. Because the court has no jurisdiction, since under Virginia Law Federal Receivers have no authority to condemn land.

2. Because the court has no jurisdiction, since the notice as served upon him and as advertised does not correspond with the language of the petition as to the width of the strip of land to be taken; in that the notice as served and advertised asks for the right to condemn a strip eighteen feet wide, while the petition asks the right to condemn a strip twenty-five feet wide.

3. Because the court has no jurisdiction, since the proceeding in no wise conforms to law, inasmuch as he, the said Thomas Talbot, owns individually a part of the said tract No. 1, and has a right under the law to expect that he shall receive a separate note addressed to him or to the tenant of the freehold as to his area, individually and that his separate individual ownership shall be condemned separately and apart from the property of all other persons, and that his lands shall not be commingled as in the present case in an unintelligible manner with the land belonging to numer-

ous other proprietors, in one and the same condemnation notice and proceeding.

4. Because the court has no jurisdiction, since no real or proper plat of survey, showing the quantity of land to be taken has been filed in the clerk's office or advertised in a properly addressed notice as required by law.

5. Because the court has no jurisdiction, since no effort has been made, to agree on the terms of purchase with him, the said Thomas Talbot, the owner of a definite interest in the land, who has always been in easy reach of the plaintiff and who is in no wise incapacitated to dispose of his said interest in the land, and who has always resided and continuously maintained an office in Norfolk City, as to the value and price of his said interest.

Which motion being so made, the said Thomas Talbot doth offer evidence in support of and to prove the matters of fact therein stated, which offer of evidence the court doth reject and refuse to allow, and the court doth also overrule the said motion to quash the proceedings on the grounds above stated, to which action of the court in refusing to allow the introduction of evidence in support of said motion and in overruling the same the said Thomas Talbot doth except.

54 The separate answer of Thomas Talbot, a defendant, being an owner of a definite, separate and individual interest in a part of the tract of land, numbered one in the petition, and constituting the right of way in use of the Bay Shore Terminal Company, to the petition of B. W. Leigh and J. A. C. Groner, receivers of the Bay Shore Terminal Company. Reserving to himself the benefit of the many errors and irregularities in the said proceedings and in the said petition, plat, profile, &c.:

1. This respondent alleges that this court cannot entertain the petition of the said receivers, because in it they ask to take a strip of land twenty-five (25) feet wide, while the notices as served by them personally and by advertisement only state that they wish to condemn a strip eighteen (18) feet wide.

2. This respondent further alleges that this court cannot entertain the petition of the said receivers, because their proceedings do not conform to the requirements of the statute, inasmuch as the respondent, owns independently and individually a part of (or at the least a present interest in a part of) the said tract of land No. 1, and has a right under the law to expect that he or the tenant of his freehold shall receive a separate notice, addressed to him individually or to the tenant of the freehold of his said area, and that his said separate individual ownership shall be condemned separately and apart from the property of all other persons, and that the damages to the residue of his tract shall be assessed separately and apart from the damages occurring to all other persons, and that his lands shall not be commingled as in the present case in an unintelligible manner with the land belonging to numerous other owners, in one and the same condemnation notice and proceeding.

This respondent alleges that he has the full, free and complete fee simple title of record to the said property, viz., a part of the

tract No. 1, twenty-five (25) feet wide and over forty-six hundred (4,600) feet long; subject only to such inchoate rights as may have attached to the same in favor of the Tanner's Creek Drawbridge Company or the Consolidated Turnpike Company, its successor, by virtue of certain condemnation proceedings started up or instituted by the Tanner's Creek Drawbridge Company in 1898, which now stand on exceptions to the report of the commissioners and have not been confirmed.

The respondent alleges that in pursuance of the 1887 Code of Virginia, section 1079, and the amended charter of the Tanner's Creek Drawbridge Company (Acts 1898-9, p. 424), the said company could not acquire anything more than a right of way in the said property, and was not authorized to condemn the fee simple interest in the property.

The respondent is advised and so alleges that, the said condemnation proceedings never having been confirmed, he is, under the decision of the Court of Appeals of Virginia, as set forth in 99 Va., p. 633, and 101 Va., p. 308; still the record owner in fee simple of the said land; and that even if these said condemnation proceedings had been confirmed, he would still be entitled to a present, actual, existing right and interest in the property, being the difference between the right of way interest and the fee simple interest; which present, existing, actual interest would entitle him to the timber growing on the land, to anything of value found indigenous in or on the soil and would entitle him to prohibit the removal of the soil to fill up some distant marsh and so forth.

3. This respondent further alleges that this court cannot entertain the petition of the said receivers, because no real or proper plat of survey, showing the quantity of land to be taken has been filed in the clerk's office or advertised as required by law. In further explanation of which the respondent alleges the following insufficiencies in the said alleged plat of survey of tract No. 1 (right of way):

(a) Because it is said to start at Tanner's Creek, which is a variable and not a fixed point, as the banks of the creek vary from year to year, and no two surveyors could estimate them the same. There should have been some invariable landmark of greater or less permanency named as the starting point, such as a stob, stone, stump, tree or other object.

(b) Because the survey in no wise indicates the quantity of land carved from the remaining lands of the respondent as the law requires.

(c) Because it does not give any courses and distances, such as would enable a surveyor to calculate the area carved from his remaining lands. The law of Virginia requires that the condemnation statutes shall be strictly construed and pursued. 98 Va., p. 90.

4. The respondent further alleges that the court cannot entertain the petition of the said receivers, because he is entitled to an individual, separate right and interest in the property as above stated, which he has in no wise incumbered, and that being so possessed of the said right and interest in the said property, no attempt has been made by the plaintiffs to agree with him, the said respondent, as to

the value or price and the terms of purchase of his said definite rights and interest in the land, although he has always been in easy reach of the plaintiffs and is in no wise incapacitated to dispose of his said right and interest in the land, and has always resided and continuously maintained an office in the City of Norfolk; that he has had no part in nor anything whatever to do with any mortgage or deed of trust placed upon its inchoate interest in the same land by any turnpike company or electric railway. The respondent is advised and so alleges that, no such effort having been made to agree on the price, this court has no jurisdiction to entertain these proceedings, and that it would be unlawful and unjust to allow the plaintiffs to drag him into court to defend these proceedings without having first attempted to agree with him as to the value of his separate, individual, unencumbered interest. And although this attempt to agree on the price need not appear of the face of these proceedings, yet if such attempt be not made, the court has no jurisdiction.

Wherefore this respondent prays that the said petition may be quashed and overruled and that he may be hence dismissed with his reasonable costs on this behalf expended.

THOS. TALBOT.

STATE OF VIRGINIA,

City of Norfolk, To wit:

I, C. L. Hendry, a notary public for the corporation aforesaid, in the State of Virginia, do certify that Thomas Talbot, whose name is signed to the above writing, personally appeared before me in my corporation aforesaid and made oath that all facts stated in the foregoing answer were true to the best of his knowledge and belief.

Given under my hand this 13th day of April, in the year 1905.

C. L. HENDRY,
Notary Public.

My commission expires July 22, 1906.

Postscript.

The following is a summary of the Acts of Assembly, which give condemnation power to the companies listed:

Indian Pole Drawbridge Co. and Tanner's Creek Drawbridge Co., Acts 1850-1, p. 128; Acts 1852, p. 152; Acts 1857-8, p. 135; Acts 1865-6, p. 392; Acts 1897-8, p. 424.

57 Bay Shore Terminal Co., Acts 1899-1900, p. 755; Acts 1901, p. 41.

Be it remembered, that on the 14th day of April, 1906, Thomas Talbot, defendant, individual owner of a part of the tract No. 1, designated as "a strip of land, &c.," came and asked leave of the court to enter a special appearance, which leave being granted, the said Thomas Talbot moved the court to dismiss the proceeding so far as it related to the said tract No. 1, upon the following grounds:

1. Because the court has no jurisdiction, since under Virginia Law Federal Receivers have no authority to condemn land.

2. Because the court has no jurisdiction, since the notice as served upon him and as advertised does not correspond with the language of the petition as to the width of the strip of land to be taken; in that the notice as served and advertised asks for the right to condemn a strip eighteen feet wide, while the petition asks the right to condemn a strip twenty-five feet wide.

3. Because the court has no jurisdiction, since the proceeding in no wise conforms to law, inasmuch as he, the said Thomas Talbot, owns individually a part of the said tract No. 1, and has a right under the law to expect that he shall receive a separate notice addressed to him or to the tenant of the freehold as to his area, individually and that his separate individual ownership shall be condemned separately and apart from the property of all other persons, and that his lands shall not be commingled as in the present case in an unintelligible manner with the land belonging to numerous other proprietors, in one and the same condemnation notice and proceeding.

4. Because the court has no jurisdiction, since no real or proper plat of survey, showing the quantity of land to be taken has been filed in the clerk's office or advertised in a properly addressed notice as required by law.

5. Because the court has no jurisdiction, since no effort has been made to agree on the terms of purchase with him, the said Thomas Talbot, the owner of a definite interest in the land, who has always been in easy reach of the plaintiff and who is in no wise incapacitated to dispose of his said interest in the land, and who has always resided and continuously maintained an office in Norfolk City, as to the value and price of his said interest.

58 Which motion being so made, the said Thomas Talbot doth offer evidence in support of to prove the matters of fact therein stated, which offer of evidence the court doth reject and refuse to allow, and the court doth also overrule the said motion to quash the proceedings on the grounds above stated, to which action of the court in refusing to allow the introduction of evidence in support of said motion and in overruling the same the said Thomas Talbot excepted and accordingly prays that this his bill of exceptions No. 1, be signed and sealed and made a part of the record in due form.

WM. N. PORTLOCK. [SEAL.]

In the Circuit Court of Norfolk County on the 14th day of April, 1906, the following order was entered:

This day came B. W. Leigh and J. A. C. Groner, Receivers of the Bay Shore Terminal Company, by counsel, and moved the court to appoint commissioners to ascertain a just compensation for the interests of all persons or corporations having any interest in or claim against or lien upon, either by deed of trust, mortgage, or other lien of record, or any reversionary interest in, the land whereof Bay Shore Terminal Company is tenant, wanted by said Receivers for the purposes and uses of said Bay Shore Terminal Company in the County of Norfolk; and, Arthur W. Depue, Thos. Talbot & M. W. Talbot appeared and filed their separate demurrers, in which the

petitioners joined, and said demurrers being argued, the same are overruled, and thereupon the said Arthur W. Depue, Thos. Talbot and M. W. Talbot filed their separate answers, to which the petitioners replied generally.

It appearing from evidence submitted to the court that the Bay Shore Terminal Company is authorized to condemn land or other property, or any estate or interest therein, for its uses, and cannot agree on terms of purchase with those entitled to an interest in said land, either by deed of trust, mortgage or other lien of record, because said parties are unknown, and that notice such as required by the statute in such case made and provided, has been given in accordance with said statute, and that the said B. W. Leigh and J. A. C. Groner, Receivers of the Bay Shore Terminal Company, have filed in the office of the clerk of this court, a plat of survey, with profile showing the cuts and fills, trestles and bridges, and a description of the said land, an interest in which, as aforesaid, is sought to be condemned, and a memorandum showing the names and residences of the owners of said land and also the quantity of land sought to be condemned, and a petition for the appointment

59 of commissioners, setting forth the estate and interest intended to be taken in said land and the material facts upon which the application for the appointment of commissioners is based, including the fact that the land sought to be condemned is wanted for the uses and purposes of the said Bay Shore Terminal Company, all in the mode prescribed by law; and,

It further appearing that the said receivers of said company have otherwise complied with the provisions of the statute in such case made and provided, and that the interest of the lienors in said land sought to be condemned is wanted for the uses and purposes of said company—

The court doth accordingly appoint W. I. Conover, J. T. Miller, V. L. Backus, John Holland, John A. Lesner, any three or more of whom may act, as commissioners for the purpose of ascertaining a just compensation for the interest of all persons or corporations having any interest in or claim against or lien upon said land, either by deed of trust, mortgage, or other lien of record, and awarding the damages, if any, resulting to the adjacent or other property of the owner or to the property of any other person, beyond the peculiar benefits that will accrue to such properties, respectively, from the construction and operation of the works of said company; and said commissioners, in making said report, will report the value of the said land as of May 1, 1902; also the present value of said land with the present improvements thereon, also the present value of said land without the present improvements, and also the amount which was agreed to be paid by the Bay Shore Terminal Company, for the right of way and interest in land conveyed by deed dated May 1, 1902, introduced in evidence in this cause;

And the court doth designate the 19th day of April, 1906, at eleven o'clock A. M. as the day and hour for said commissioners to meet on said land; and the said commissioners are ordered to make report to this court according to law.

The following is extract from order served on the commissioners, with sheriff's endorsement thereon:

VIRGINIA:

In the Circuit Court of Norfolk County, on the 16th day of April, 1906.

60 In the Matter of B. W. Leigh and J. A. C. Groner, Receivers of the Bay Shore Terminal Company, Condemning the Land Whereof Bay Shore Terminal Company is Tenant of the Freehold.

The court doth appoint W. I. Conover, J. T. Miller, V. L. Backus, John Holland and John A. Lesner, any three or more of whom may act, commissioners for the purpose of ascertaining a just compensation for the interest of all persons or corporations having any interest in or claim against or lien upon said land, either by deed of trust, mortgage or other lien of record or any reversionary interest therein, and awarding the damages, if any, resulting to the adjacent or other property of the owner, or to the property of any other person beyond the peculiar benefits that will accrue to such property, respectively, from the construction and operation of the works of said company. And said commissioners in making said report will report the value of the said land as of May 1st, 1902, also the present value of said land with the present improvements thereon, also the present value of said land without the present improvements, and also the amount which was agreed to be paid by the Bay Shore Terminal Company for the right of way and interest in said land conveyed by deed dated May 1st, 1902, introduced in evidence in this cause.

And the court doth designate the 19th day of April, 1906, at eleven o'clock A. M. as the day and hour for said commissioners to meet on said land. And said commissioners are ordered to make report to this court according to law.

An extract:

Teste:

ALVAH H. MARTIN, *Clerk*,
By CORA P. PARKER, *D. C.*

Sheriff's Return.

Executed April 18, 1906, by delivering a copy of the within writ to each of the within named persons.

A. C. CROMWELL, *Sheriff*,
By WM. CARMINE, *Deputy*.

61 The following commissioners' report was filed on the 29th day of June, 1906:

STATE OF VIRGINIA,
City of Norfolk, To wit:

I, Tazewell Taylor, a notary public for the city aforesaid, do certify that W. I. Conover, J. T. Miller, V. L. Backus, John Hol-

land, and John A. Lesner, have this day made oath before me that they will faithfully and impartially ascertain what will be a just compensation for the interest of all persons or corporations having any interest in or claim against or lien upon said land, either by deed of trust, mortgage or other lien of record, of the freehold whereof the Bay Shore Terminal Company is tenant; and for such other property as is proposed to be taken by the Bay Shore Terminal Company for its purposes, and award damages, if any, resulting to the adjacent or other property of the owner or to the property of any other person, beyond the peculiar benefits that will accrue to such properties, respectively, from the construction and operation of the company's works, and to certify the same—

Given under my hand this the 19th day of April, in the year 1906.

TAZEWELL TAYLOR,
Notary Public.

We, W. I. Conover, J. T. Miller, V. L. Backus, John Holland and John A. Lesner, commissioners appointed by the Circuit Court of Norfolk County, Virginia, to ascertain what will be a just compensation for the interest of all persons or corporations having any interest in or claim against or lien upon the land—whether said interest in, claim against, or lien upon the land, be by deed of trust, mortgage or other lien of record—of the freehold whereof the Bay Shore Terminal Company is tenant, and for such other property as is proposed to be taken by the Bay Shore Terminal Company for its purposes, and to assess the damages, if any, resulting to the adjacent or other property of the said owners, beyond the peculiar benefits that will accrue to such properties, from the construction and operation of the company's works, and to certify the same.

Do certify that on the 19th day of April in the year 1906, the day designated in said order, we met together on the said part of the land the limits of which part were then and there described to us as follows, to-wit:

62 First. A strip of land twenty-five feet in width, in the County of Norfolk, State of Virginia, lying on the western side of the Road of Consolidated Turnpike Company and extending the whole length of said road from Tanner's Creek to the northern terminus of said turnpike, containing by survey twelve and one-half acres.

Second. A lot or parcel of land in the County of Norfolk, Virginia, north of and adjacent to Tanner's Creek, and bounded and described as follows:

Beginning at a point on the eastern line of the Toll Road, in Talbot's line, marked A, and running thence South 72 degrees 22 minutes East 142 feet; thence South 40 degrees 30 minutes East, to Tanner's Creek; and then beginning again at the starting point and running South 10 degrees 30 minutes West along the said Toll Road 315 feet, and thence South 79 degrees 29 minutes East to Tanner's Creek, and bounded on the East by Tanner's Creek. Containing by survey two and one-half acres of land.

Together with the perpetual right in said Bay Shore Terminal Company, its successors and assigns, to cross the Turnpike of said Consolidated Turnpike Company, with not more than two tracks, north of and near Tanner's Creek, for the purpose of enabling said Bay Shore Terminal Company to reach its car barns, with its cars, from said strip of land on the west extending from Tanner's Creek northwardly to a point near Ocean View.

The interest in the above described land, proposed to be taken, is the interest of all persons or corporations having any interest in or claim against or lien upon the land, whether the said interest in or claim against or lien upon the land be by deed of trust, mortgage or other lien of record. The other property proposed to be taken is hereinafter mentioned, itemized and valued.

And after being duly sworn, upon a view of the property aforesaid, and of the adjacent and other property of the said owners, holding by deed of trust, mortgage or other lien of record; and upon such evidence as was before us.

We are of opinion and do ascertain: That for the interest or estate of all persons or corporations having any interest in or claim against or lien upon said land—whether said interest or estate, claim, or lien be by deed of trust, mortgage or other lien of record—and for the other property of said owners:

63	If valued as of the 1st day of May, 1902.....	\$5,000.00
	Will be a just compensation.	
	If valued as of the date of this report, without improvements	6,200.00
	Will be a just compensation.	
	For the land, with improvements	7,200.00
	For the steel rails	15,000.00
	For the railroad ties	1,250.00
	For the poles	1,250.00
	For the overhead construction	2,500.00
	For the machinery in powerhouse.....	25,000.00
	For the buildings on Tract No. 2.....	5,000.00
	Making a total of	\$57,200.00

Will be a just compensation.

And that there will be no damages resulting to the adjacent and other property of said parties, whose property is taken.

We would further report that the evidence before us shows that the steel rails, overhead wires and the machinery in the power house could be removed from the premises without interfering with the freehold.

We further report that we did not take into consideration any damages to any other person other than those persons or corporations having an interest in or claim against or lien upon said land, whether said interest in, claim against or lien upon said land be by deed of trust, mortgage or other lien of record.

As directed by the court, we would further report that on the first day of May, 1902, the Bay Shore Terminal Company purchased

this property, together with other property in Norfolk City, from the Consolidated Turnpike Company, giving as consideration for said conveyance \$22,500.00 of the first mortgage five per cent. bonds of the Bay Shore Terminal Company and \$5,600.00 in money of the capital stock of said company, of the par value of \$100.00 per share, which was believed at that time to be worth the sum of twenty-five thousand dollars.

We, the undersigned condemnation commissioners, further report that in estimating the value herein, and in making up the figures therefor we have not considered or passed upon the value of the reversionary interest in Tract No. 2, as to which Diana Talbot, Mary

T. Ruffin, Elizabeth W. Talbot, Minton W. Talbot, and
64 Thomas Talbot, were summoned in these proceedings, because

the said interest therein is not to be taken from them or any of them, under the order of the court entered herein; and we further report that we have not considered, estimated or passed upon the damages that will or may accrue to or be sustained by the said Thomas Talbot or Minton W. Talbot or either of them, as to their adjacent lands by reason of the location, construction, maintenance or proper and reasonable operation of the works of the plaintiff in this condemnation proceeding; and we further report that we have not considered or estimated the value of any interest or right which the said Thomas Talbot or Minton W. Talbot, or either of them, has in Tract No. 1, (right of way) or any part thereof.

That portion of the right of way described in this proceeding was estimated at the time of the aforesaid conveyance, to represent four-fifths of the total value of the right of way conveyed in said deed.

A copy of the deed therefor is filed with the record in this proceeding, and we refer to the same as showing the exact consideration for said conveyance.

We herewith file a transcript of the testimony taken before us. We were engaged five days.

Given under our hands this 15th day of May, 1906.

W. I. CONOVER,
JOHN HOLLAND,
V. L. BACKUS,
J. T. MILLER,
JOHN A. LESNER,

Commissioners.

The following exceptions to commissioners' report was filed August 6th, 1906:

Exceptions of Arthur W. Depue, the Holder of Bonds of the Aggregate Value of Ninety Thousand Dollars, Secured by a Deed of Trust from the Consolidated Turnpike Company of Norfolk, Virginia, to Walter H. Taylor, Trustee, Hereinbefore Filed and Introduced in Evidence in this Cause, to the Report of the Commissioners W. I. Conover, J. T. Miller, V. L. Backus, John Holland and John A. Lesner, Made in this Proceeding and Filed in the Clerk's Office of this Court on the 29th day of June, 1906.

The said Arthur W. Depue excepts to the report of said commissioners upon the following grounds:

65 1. Because the petitioning receivers herein have not the power under the law to institute and prosecute such a proceeding as this.

2. Because the petition of the receivers herein filed is not verified by the proper officers, designated by law for that purpose.

3. Because the original memorandum filed by the petitioning receivers in this proceeding does not give as required by law the residences of the owners of the property sought to be condemned.

4. Because the Consolidated Turnpike Company of Norfolk, Virginia, which executed the mortgage or deed of trust to Walter H. Taylor, trustee, in these proceedings before mentioned and filed, securing the aforesaid bonds of said Arthur W. Depue, and which also executed the deed to the Bay Shore Terminal Company, in these proceedings before mentioned and filed, and which was the owner of the property sought herein to be condemned, and conveyed by the said turnpike company by the deed last aforesaid to the Bay Shore Terminal Company, of which latter company the petitioners are receivers, subject to the lien of the deed of trust securing the bonds owned as aforesaid by the said Arthur W. Depue, was at the time of the institution of these proceedings and is now a corporation possessing itself the power of eminent domain under the law, and therefore said petitioning receivers could not take the property herein sought to be condemned and cannot institute and carry on this proceeding until the State Corporation Commission of Virginia, after hearing all parties in interest, shall certify that a public necessity or that an essential public convenience shall so require and shall give its permission thereto; and because such certificate has never been given by the said State Corporation Commission and the petition herein fails to show the grant of any such certificate by the said State Corporation Commission.

5. Because the petition does not show and it has not been shown in this proceeding, as required by law in order to take property of this kind sought herein to be condemned, that the taking of the same was essential to the purposes of the petitioning receivers or the Bay Shore Terminal Company.

6. Because the petition herein is framed with the view and intention that the Bay Shore Terminal Company itself is entitled to and should share in the proceeds of any property condemned in this proceeding, and thereby the petitioning receivers herein are endeavoring to condemn property already belonging to the Bay Shore Terminal Company, of which they are receivers.

7. Said report is also excepted to by said Arthur W. Depue on the ground that the property sought to be condemned in these proceedings is part and parcel of a piece of property, a part of which lies in the City of Norfolk, and which part in the City of Norfolk the petitioning receivers are seeking to condemn by condemnation proceedings in the Corporation Court of the City of Norfolk instituted simultaneously with this, and this is a violation of the right of said Arthur W. Depue to have the value of the whole of said property, both that in the city and that in the county, estimated as a whole; and the petitioning receivers have no right in seeking to take the whole of said property to institute separate proceedings in separate jurisdictions to take different parcels thereof, but should have instituted one proceeding for the taking of the whole strip in this court because the greater portion of said strip lies in the County of Norfolk.
8. The report is also excepted to by said Arthur W. Depue because the Bay Shore Terminal Company having purchased the property herein sought to be condemned, subject to the deed of trust or mortgage securing the bonds of Depue, it occupied and was substituted in the place of the mortgagor, the Consolidated Turnpike Company and said Bay Shore Terminal Company by said purchase came into the right of the Consolidated Turnpike Company to redeem said property from said mortgage by the payment of said bonds; and because the petitioning receivers of the Bay Shore Terminal Company stand exactly as said company does relative to the property sought to be condemned, and the statute never intended to give to a purchaser from a mortgagor, or persons occupying the place of said purchaser the right to condemn the interest of their mortgagee. They have the right of redemption and the statute did not intend to give said petitioning receivers the right to condemn property of which they also had the right of redemption, and were the owners subject to said deed of trust.
9. Said report is also excepted to by said Arthur W. Depue in so far as it treats the 1st day of May, 1902, as the date at which the value of the property sought to be taken is to be estimated and just compensation therefor made.
10. Said report is also excepted to by said Arthur W. Depue in so far as it contemplates and does not include the improvements on the land on the 1st day of May, 1902, in estimating the value thereof or the compensation to be paid therefor, even if the court should be of opinion that that is the proper date as of which said compensation and value is to be ascertained.
11. It is also excepted to by said Arthur W. Depue on the ground that even if the court should be of opinion that the property herein sought to be taken should be valued as of the 1st day of May, 1902, that the compensation and value placed upon said property as of that date is grossly inadequate and not just compensation therefor.
12. Said Arthur W. Depue also excepts to said report in so far as it contemplates and does not consider in estimating the value and

just compensation for the property herein sought to be taken, the improvements of all kinds and descriptions upon said property.

13. Said report is also excepted to by said Arthur W. Depue on the ground that the values and compensation ascertained by said commissioners to be made for the property herein sought to be taken, if estimated as of the time of their award, is grossly inadequate and not just compensation therefor.

14. Said report is also excepted to by said Arthur W. Depue on the ground that the values and compensation ascertained by said commissioners to be made for the improvements on said land, if estimated as of the date of the award of said commissioners, is grossly inadequate and not just compensation therefor.

15. Said report is also excepted to by said Arthur W. Depue on the ground that if it is held that the proper interpretation of the present statute of eminent domain is that this property can be taken and that in the measure of damages the value of the land alone is to be considered without improvements, then that such interpretation impairs the obligation of a contract within the constitution of the United States, because it is a different interpretation from what the Court of Appeals of Virginia prior to this new statute has placed upon the statute law relative to such improvements.

16. Arthur W. Depue also excepts to said report on the ground that W. I. Conover, one of the commissioners who made the report in this cause, had been one of a former set of commissioners who had assessed the value of this strip in another condemnation proceeding.

ARTHUR W. DEPUE,

By Counsel.

NATH'L T. GREEN,
Attorney.

In the Circuit Court of the County of Norfolk.

J. A. C. GRONER & B. W. LEIGH, Receivers for the Bay Shore Terminal Company,

v.

CONSOLIDATED TURNPIKE COMPANY, WALTER H. TAYLOR, Trustee,
& Others.

In Condemnation Pro—.

68 Now comes the Norfolk and Ocean View Railway Company, the purchaser of the property and franchises of the Bay Shore Terminal Company, pursuant to a decree of the Circuit Court of the United States for the Eastern District of Virginia in Charles E. Fink v. Bay Shore Terminal Company and others, and moves the court to discontinue these proceedings for the reasons heretofore given on the motion this day filed to vacate and dismiss the same, inasmuch as a continuation of the proceedings with errors as aforesaid would fail to vest a good and sufficient title in and to the property sought to be condemned in these proceedings, and it is necessary that said errors be corrected.

Motion to Dismiss.

Now comes the Norfolk and Ocean View Railway Company the purchaser of the property and franchises of the Bay Shore Terminal Company, pursuant to a decree of the Circuit Court of the United States for the Eastern District of Virginia, in Charles E. Fink v. Bay Shore Terminal Company and others, appearing specially for the purpose of this motion and for no other purpose, and moves the court to vacate and dismiss the proceedings heretofore had in this cause for the following reasons:

First. Because the petition filed in these proceedings fails to set up material matters as required by statute.

Second. The said petition fails to show that the petitioners secured the certificate of the State Corporation Commission that a public necessity or an essential public convenience required the condemnation asked for in said petition, or that said permission of said State Corporation Commission was ever granted.

Third. That said petition is fatally defective in that it was filed by the Receivers of said Bay Shore Terminal Company and prosecuted by said receivers, instead of by and in the name of the Bay Shore Terminal Company.

Fourth. That the said receivers, petitioners, had no authority or right under the laws of this State to institute said proceedings.

Fifth. Because the amounts ascertained by the commissioners appointed in these proceedings were not paid either to the party or parties entitled thereto, or into court, within three months from the date of the filing of the report of the commissioners, as provided in paragraph twenty-seven of section 1105-f of the Code of Virginia of 1904, in pursuance of which these proceedings were instituted and conducted.

Sixth. And for other good and sufficient causes appearing upon the face of the record.

69 In the Circuit Court of Norfolk County, on the 6th day of August, 1909, the following order was entered:

In the Matter of B. W. LEIGH and J. A. C. GRONER, Receivers of the Bay Shore Terminal Company, Condemning the Land Whereof Bay Shore Terminal Company is Tenant of the Freehold.

Arthur W. Depue, the defendant in this cause, having heretofore abandoned formally in open court the demurrer of the said Arthur W. Depue, and all objections to the order of the court overruling said demurrer, and also having withdrawn formally all his objections to these proceedings contained and set out in paragraph No. 7 of his answer filed to the petition in this cause and also having withdrawn all the objections set forth to these proceedings in paragraph No. 5 of his said answer, and also having abandoned and withdrawn his exceptions to the action of the court in overruling the motion to quash these proceedings, which is made the subject of a bill of ex-

ceptions by the said Arthur W. Depue, filed in this cause on April 14th, 1906, and the said Arthur W. Depue having heretofore formally waived the exceptions numbered 1, 2, 3, 4, 5, 6, 7, 8, and 16 of the said Arthur W. Depue, to the report of the commissioners filed in this cause and Walter H. Taylor, trustee under mortgages and deeds of trust securing the bonds of the said Arthur W. Depue, having joined with the said Arthur W. Depue in waiving and abandoning the aforesaid objections and exceptions, this cause this day came on again to be heard upon the report of the Commissioners filed herein on the 29th day of June, 1906, and exceptions thereto upon the transcript of evidence presented before said commissioners, filed as a part of their said report, including the evidence of H. L. Page, C. N. Drummond, H. R. Palmer and J. A. C. Groner, which was all the parol evidence produced before said commissioners, and which evidence by consent of parties was to be read as if submitted upon the motion to confirm said report, upon the papers formerly read, and upon the written motion of the Norfolk and Ocean View Railway Company, the purchaser of the property and franchises of the Bay Shore Terminal Company under the decrees of the Circuit Court of the United States for the Eastern District of Virginia, by which said property was sold, copies of which said decrees have been filed in these proceedings, and which said company as such purchaser succeeds to the rights and liabilities of the plaintiffs herein, to vacate and dismiss the proceedings heretofore had in this cause, claiming in said motion to appear specially for said purpose and for no other, and upon the written motion of said Norfolk and Ocean View

70 Railway Company that the court discontinue these proceedings for the reasons set forth in said written motion, and upon the appearance of said Norfolk and Ocean View Railway Company by counsel, on the hearing of the exceptions to said report of said commissioners hereinbefore mentioned, and was argued by counsel.

Upon consideration whereof the court doth overrule the motion of said Norfolk and Ocean View Railway Company to dismiss and vacate the proceedings heretofore had in this cause, and its motion to discontinue said proceedings, and doth decide that by the acts of the said Norfolk and Ocean View Railway Company aforesaid it has appeared generally and made itself a party to these proceedings as successor to the interests of plaintiffs and petitioners herein, and to this action of the court in overruling said motion and deciding that it has appeared generally in these proceedings and become a party thereto, said Norfolk and Ocean View Railway Company excepts; and the court being of the opinion, for reasons stated in writing and filed herewith as part of this decree and order, that that portion of the report of the commissioners filed on June 29th, 1906, that finds and ascertains that a just compensation for the interest in the property, described in the said report of the commissioners as tract number one (right of way) and tract number two (power house site, etc.) of all persons or corporations having any interest in or claim against or lien upon the land, whether the said interest in or claim against or lien upon the land be by deed of trust, mortgage or other lien of record is the sum of fifty-seven thousand and two hundred dollars

(\$57,200.) should be confirmed, and that the said Norfolk and Ocean View Railway Company should in addition pay the interest on said sum at the rate of six per cent. per annum from the date of the entry of this order, and it further appearing to the court that the said Norfolk and Ocean View Railway Company, as the successor of the petitioners of this cause, have been for more than a year and still are in possession of the land and property in the petition and proceedings in this cause mentioned doth adjudge, order and decree that the said Norfolk and Ocean View Railway Company do, within three months from the date of the entry of this order, deposit in some National Bank or National Banks in the City of Norfolk, Virginia, to the credit of this cause and subject to the order of the court in this cause the sum of \$57,200.00 with interest as aforesaid from the date of this order, and the certificate or certificates of deposit therefor shall deliver to the clerk of this court to be held by him

subject to the order of the court herein: it being understood
71 that the said award of \$57,200.00 does not include any amount, allowance or payment whatever for the reversionary interest in tract number two (2) of Diana Talbot, Mary T. Ruffin, Elizabeth W. Talbot, Minton W. Talbot and Thomas Talbot; nor for the damages that will or may accrue to or be sustained by Thomas Talbot or Minton W. Talbot or either of them, as to their adjacent lands by reason of the location, construction, maintenance or proper and reasonable operation of the works of the plaintiffs in this condemnation proceeding; nor for the value of any interest or right which the said Thomas Talbot or Minton W. Talbot, or either of them, has in tract number one, or any part thereof.

It is further ordered, adjudged and decreed that the said Norfolk and Ocean View Railway Company pay into court the costs attending these proceedings.

To which action of the court in so confirming said award and directing payment by the Norfolk and Ocean View Railway Company, the said Norfolk and Ocean View Railway Company claiming to appear especially for said purpose, objected and excepted.

And by consent of Arthur W. Depue, Walter H. Taylor, trustee, and the Norfolk and Ocean View Railway Company, by their attorneys, given in open court, and now entered of record, leave is granted to the said parties, or either of them, within sixty days from the adjournment of this court, to tender their bills of exceptions taken to ruling of the court on the hearing of this cause, to the judge of this court in term time or vacation, to be signed by him and filed with and made a part of the record in this cause.

The following was filed in court August 6th, 1909:

In the Circuit Court of Norfolk County, and Corporation Court for Norfolk City.

B. W. LEIGH and J. A. C. GROVER, Receivers of the Bay Shore Terminal Company.

VS.

CONSOLIDATED TURNPIKE COMPANY, WALTER H. TAYLOR, Trustee, and Others.

The several other matters in issue brought before the court in the above styled proceedings having been heretofore ruled upon, the question now presented for consideration and decision is which of two reports returned by the commissioners should be confirmed, the one assessing damages for the right of way and land sought to be condemned or the other assessing damages for the said right of way and land together with the improvements thereon, consisting of rails, ties, poles, overhead structures, buildings, power house, and machinery.

The exceptions filed by Arthur W. Depue have been withdrawn, and he is asking that the report awarding compensation for the said right of way and land including the improvements be confirmed. This motion is opposed by the plaintiffs, who insist that if either report is to be confirmed only that one should be confirmed which awards compensation for the land and right of way without the improvements.

The said turnpike company by its deed bearing date of — sold and conveyed to the said Terminal Company the land and right of way in controversy, and at the time of this sale and conveyance the said right of way and land were affected with the liens of two deeds of trust, both duly of record and which moreover were both mentioned in the deed from the said Turnpike Company to the said Terminal Company. The improvements referred to were constructed by the Terminal Company after it has acquired the said right of way and land from the Turnpike Company and while the said deeds of trust were in force and subsisting liens against the same. Neither trustee nor creditor gave consent to the making of said improvements, nor was there any waiver of right that the liens of said deeds of trust should attach thereto.

It is conceded by counsel for the plaintiffs that under the common law improvements, of a kind to become a part of the realty if affixed to the soil, when placed upon mortgaged land, ordinarily become a part of the freehold and enure to the benefit of the mortgagee, and that therefore liens of deeds of trust originally upon unimproved land attach and extend to such improvements subsequently affixed thereto.

They contend however that there are some exceptions to the general rule and that the case at bar falls within the exceptions, that is to say, that the Terminal Company, being a railroad company and a public service corporation possessing the power of eminent domain, and having acquired the right of way and land, upon which it subsequently made the said improvements, by grant from the Consolidated Turnpike Company at a time when said turnpike company had not defaulted in its obligations under the said deeds of trust, or

at least when no movement was being made to foreclose, is entitled to hold the said improvements free from the said liens and exempt from consideration as a subject of compensation in the assessment of damages in condemnation proceedings.

73 Counsel for plaintiffs in a very able and exhaustive brief are insisting that the improvements should not be considered in ascertaining a proper compensation for the right of way and land taken, and in support of their position have cited a vast number of decisions from States other than Virginia. These decisions are of persuasive force, but before accepting them as defining a principle to be followed in the case at bar inquiry should be directed to determining whether the Virginia decisions referring to the same general subject are opposed to the doctrine and principles contended for by the plaintiffs as existing in other States. If the improvements placed upon the land as aforesaid are not a part of it, it must be because they are personal property, either inherently so as being trade fixtures or made so by understanding and agreement between parties having the right to deal in this manner with the property. The trend of authority in this State is that improvements of the kind under consideration are not trade fixtures, and as to the other proposition there is nothing in the record to justify the conclusion that there was ever any understanding or agreement, actual or implied, that the improvements should retain their character of personality after being fastened to the soil.

Improvements of the kind mentioned, placed upon land by a private person, under the circumstances recited, would become permanently affixed to the land and would be subject to the liens of the said deeds of trust. This being so we are now led to inquire whether there is any good reason, under the Virginia authorities, why the same rule should or should not apply if the improvements are made by a railroad or other public service corporation vested with the power of eminent domain. It is true that such a corporation may condemn without making the trustee or deed of trust creditor a party to the proceedings, and may require complete title as against trustee and creditor by paying into court the compensation and damages awarded and assessed, and leaving to the court the distribution of the fund as it might thereafter find proper. But this is so by virtue of the statute, and the right thus to acquire property and hold it free from liens is accorded to corporations in condemnation proceedings provided they follow the mode of procedure prescribed by the statute.

In the present case it is to be noted that the Terminal Company did not originally proceed to acquire the land and right of way in controversy by condemnation, but undertook to acquire and did acquire the same by purchase from the Turnpike Company directly. In so doing it bought in subordination to the said liens and in complete subjection to them.

74 *Graene v. Cullen*, 23 G. 293.

Wood's Ex'or v. Krebs, 33 G. 685.

Newport News, &c. v. Lake, &c., 101 Va. 334.

Fulkerson v. Taylor, 102 Va. 320.

Flanary v. Kane, 102 Va. 547.

Newport News, &c. v. Lake, &c., 105 Va. 311.

The last four cases cited are authority for the assertion that in Virginia railroad companies in the acquisition of property, except where special rights are given them by charter, are governed by the same principles that control private individuals. In the case of *Fulkerson v. Taylor*, the court answering the contention that the same principles of law do not apply to allowances for improvements when made by a railroad as apply when made by private individuals, calls attention to the fact that the laws of the State provide how such a corporation may acquire title to lands and refer any controversy as to such title to the damages in the condemnation proceedings. On this question the court speaks as follows: "Where such a corporation attempts to acquire title to lands by purchase from the occupant or supposed owner, we know of no rule of law which exempts it from the ordinary principles of law applicable to private individuals purchasing under like circumstances. A corporation, except where it is otherwise provided in its charter, expressly or by clear implication, in the acquisition and use of its property, the exercise of its powers, and the transaction of its business, stands upon the same footing as private individuals."

Again in the case of *Newport News, &c. v. Lake and Others*, 101 Va. 334, it is said: "The evidence shows that in addition to the constructive notice afforded by the recordation of the deeds, the railway company had actual notice of appellee's rights. And with such notice the circumstance that it treated with the land company alone justified the conclusion that it chose to assume the risk of that company perfecting its title by paying the purchase money and discharging the lien of the deed of trust." And so in the case at bar the Terminal Company purchased directly from the Turnpike Company with full knowledge of the liens on the property purchased, and it must therefore be assumed that it preferred to take the property by purchase and run the risk of the removal of the liens by the Turnpike Company rather than to procure a perfect title at once by condemnation.

It is argued by plaintiffs' counsel that the trustee under the said deeds, in suffering a part of the consideration paid for the land and right of way to be lodged with him and in not objecting to
75 plaintiffs' possession of said land and right of way must be regarded as having on behalf of himself and creditor consented to the sale and transfer and thus to have waived their lien rights as to the property sold. It is not claimed however, that there was any actual consent to such transfer or direct waiver of lien rights, and it would be strange indeed if a trustee or creditor could not receive part payment of a debt or additional security therefor without impairing his rights under the securities already held. It is equally as true that neither trustee nor creditor is called upon to protest against a transfer of the trust property. It is sufficient that the party purchasing has notice of the liens. Again quoting from the opinion in the Lake case above referred to, which itself quotes with approval from *Lewis on Eminent Domain*, we find it said, "as regards the title of the Lakes, the railway company was an intruder upon the premises, and there is no law which compels a man to protest against a wrongful entry upon his land at the peril of being

— to ratify it. Both parties knew their rights. The law provides a mode in which a party seeking to obtain property for public use may do so lawfully. If such a party disregards the mode prescribed, and enters upon property without consent, it is a wrong doer and can acquire no right by expending money on the property. Nor does the property owner lose any rights by mere delay'."

In the second case referred to of *Newport News, &c. v. Lake and Others*, 105 Va. 311, the court in approving the action of the lower court refusing an instruction which sought to limit the Lakes to compensation only for the land actual condemned says: "This strip of land had been occupied by the railway continuously since 1892; it had, in the meantime, been repurchased by the Lakes for default in the payment of the money due under the deed of trust which rested upon it; when they repurchased it they acquired the property as it existed at the time of its purchase; and when condemnation proceedings were instituted they were the complete owners of the land and all that was upon it."

In the case just mentioned the compensation awarded was based upon the valuation of the land with the improvements placed upon it by the railway company, and it differs from the case at bar only in the fact that condemnation proceedings were there resorted to after foreclosure of the deed of trust lien, while in the case at bar condemnation proceedings are being prosecuted before foreclosure, and in the meanwhile foreclosure is being restrained by an injunction issuing from a Federal court. The rights of the creditors in each case proceed from deed of trust liens, and the two cases when compared present a distinction rather than a difference.

76 Save for this distinction the two cases are similar, and the reasoning which would authorize considering the improvements in the Lake case in assessing damages would as regards the trustee and trust creditor authorize a like consideration in the case at bar.

In accordance with the foregoing expressed views, it is the opinion of the court that the deeds of trust upon the right of way and land in controversy are valid and binding liens upon the same including the improvements thereon, and that the value of these liens cannot be impaired by any proceedings which assume to take the land without allowing compensation for the improvements as well. The report of the commissioners awarding compensation for the right of way and land with the improvements is therefore confirmed, and the plaintiffs in order to acquire perfect title to the said property should pay into court the compensation and damages as set out in the said report, leaving to the court the disposition of the fund as it may hereafter find proper.

In closing this opinion it may be said with reference to the two cases, relied upon particularly by plaintiffs' counsel in support of their position, that neither is decisive of the case at bar. These cases are *Searl v. School District*, etc., 133 U. S. 553, and *St. Louis, etc. R. Co. v. Nyce*, 48 L. R. A. 241, the former being a case from the State of Colorado and the latter a case from the State of Kansas.

In the former the court's decision rested upon the fact, admitted

in the pleadings, that the School District purchased the land upon which it subsequently erected its school building under the bona fide belief that it was acquiring a complete and perfect title thereto. There the situation was vastly different from that in the present case. In the Searl case the School District honestly believed that it was the absolute owner of the land which it undertook to improve; in the present case the Terminal Company knew that it was not the absolute owner of the land bought by it and that it could not acquire complete title thereto until the liens against the same were released. Again from the opinion in the Searl case it is to be inferred that if the School District has entered as a trespasser, it could not have invoked the equitable principle upon which the case was decided. Although in the case at bar the Terminal Company may not have entered as a trespasser, it necessarily knew at the time that it would become an intruder upon the rights of trustee and creditor whenever default was had under the trust deeds and foreclosure sought to be exercised against the trust property.

77 In the Kansas case the reasoning for the decision there reached proceeds upon the theory that the railroad improvements placed upon the land purchased by the railroad company are personal property and never became a part of the realty; and in its decision the court asserts that if the improvements are to be treated as part of the real estate, then the value of the improvements should be considered in estimating damages in condemnation proceedings. Moreover, it appears from the same decision that the Kansas statute relating to the exercise of the power of eminent domain by railroad companies authorizes the commencing of condemnation proceedings by a railway corporation after the road has been constructed. As the Virginia statutes on the subject of eminent domain contain no such provision in favor of railway corporations and as the Virginia cases furnish no authority for regarding the improvements under consideration as personal property, it is obvious that the Kansas case is not in itself to be taken as a precedent for decision in the case at bar.

It is needless to consider the other cases cited by plaintiffs' counsel. It is sufficient to say that the doctrine, reasoning, and principles upon which the decisions in the several cases depend do not appear to have received the sanction of the Virginia courts.

K. A. BAIN,
A. R. HANCKEL.

And at another day, to-wit: In the Circuit Court of Norfolk County, on the 29th day of September, 1909, the following order was entered:

In the Matter of B. W. LEIGH and J. A. C. GRONER, Receivers of the Bay Shore Terminal Company, Condemning an Interest in the Land Whereof the Bay Shore Terminal Company is Tenant of the Freehold.

This day came the Norfolk and Ocean View Railway Company, and in pursuance of the leave granted herein on the 6th day of

August, 1909 (this day being within sixty days from the adjournment of the July term, 1909, of said Circuit Court), and presented its eight bills of exceptions, numbered, respectively, one, two, three, four, five, six, seven and eight, which were received, signed and sealed by me, and ordered to be made a part of the record in this cause.

The following are the bills of exceptions, numbers one, two, three, four, five, six, seven and eight, referred to in above order:

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Bill of Exceptions No. 1.

Be it remembered, that on the trial and hearing of this cause, upon the motion of Arthur W. Depue to confirm the report of the commissioners theretofore appointed to ascertain the just value of so much of the land whereof the Bay Shore Terminal Company was tenant of the freehold, came the Norfolk and Ocean View Railway Company, the purchaser of the property and franchises of the Bay Shore Terminal Company, pursuant to a decree of the Circuit Court of the United States for the Eastern District of Virginia, in *Charles E. Fink v. Bay Shore Terminal Company* and others, claiming to appear specially for the purpose of said motion, and moved the court, prior to the confirmation by the court of the report of said commissioners, to vacate and dismiss the proceedings heretofore had in this cause for the following reasons:

First. Because the petition filed in these proceedings fails to set up material matters as required by statute.

Second. The said petition fails to show that the petitioners secured the certificate of the State Corporation Commission that a public necessity or an essential public convenience required the condemnation asked for in said petition, or that permission of said State Corporation Commission was ever granted.

Third. That said petition is fatally defective in that it was filed by the receivers of said Bay Shore Terminal Company and prosecuted by said receivers, instead of by, and in the name of the Bay Shore Terminal Company.

Fourth. That the said receivers, petitioners, had no authority or right under the laws of this State to institute said proceedings.

Fifth. Because the amounts ascertained by the commissioners appointed in these proceedings were not paid either to the party or parties entitled thereto, or into court, within three months from the date of the filing of the report of the commissioners, as provided in paragraph 27 of section 1105-f of the Code of Virginia of 1904, in pursuance of which these proceedings were instituted and conducted.

Sixth. And for other good and sufficient causes appearing upon the face of the record.

Which said motion of the Norfolk and Ocean View Railway Company, claiming to appear specially for that purpose, to vacate and dismiss the said proceedings the court overruled, to which said action of the court in overruling said motion to vacate and dismiss, the said Norfolk and Ocean View Railway Company excepts, and prays that this, its Bill of Exceptions No. 1, may

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be signed, sealed and made a part of the record herein, and the same is accordingly done, this 29th day of September, 1909.

B. D. WHITE, [SEAL.]

*Presiding Judge of the Circuit Court
of the County of Norfolk, Virginia.*

Bill of Exceptions No. 2.

Be it remembered, that on the trial and hearing of this cause, upon the motion of Arthur W. Depue to confirm the report of the commissioners theretofore appointed to ascertain the just value of so much of the land whereof the Bay Shore Terminal Company was tenant of the freehold, came the Norfolk and Ocean View Railway Company, the purchaser of the property and franchises of the Bay Shore Terminal Company, pursuant to a decree of the Circuit Court of the United States for the Eastern District of Virginia, in *Charles E. Fink v. Bay Shore Terminal Company and others*, claiming to appear specially for the purpose of said motion, and moved the court, prior to the confirmation by the court of the report of said commissioners, to discontinue said proceedings for the reasons given on the motion made to vacate and dismiss said proceedings, which said reasons are as follows:

First. Because the petition filed in these proceedings fails to set up material matters, as required by statute.

Second. The said petition fails to show that the petitioners secured the certificate of the State Corporation Commission that a public necessity or an essential public convenience required the condemnation asked for in said petition, or that said permission of said State Corporation Commission was ever granted.

Third. That said petition is fatally defective in that it was filed by the receivers of said Bay Shore Terminal Company and was prosecuted by said receivers, instead of by and in the name of the Bay Shore Terminal Company.

Fourth. That the said receivers, petitioners, had no authority or right under the laws of this State to institute said proceedings.

Fifth. Because the amounts ascertained by the commissioners appointed in these proceedings were not paid either to the party or parties entitled thereto, or into court, within three months from the date of the filing of the report of the commissioners, as provided in paragraph 27 of section 1105-f of the Code of Virginia of 1904, in pursuance of which these proceedings were instituted and conducted.

Sixth. And for other good and sufficient causes appearing upon the face of the record.

Which said motion of the Norfolk and Ocean View Railway Company, claiming to appear specially for that purpose, to discontinue said proceedings for the reasons given on the motion made to vacate and dismiss said proceedings, the court overruled, to which said action of the court in overruling said motion to discontinue said proceedings the said Norfolk and Ocean View Railway Company ex-

cepts, and prays that this, its Bill of Exceptions No. 2, may be signed, sealed and made a part of the record herein, and the same is accordingly done, this 29th day of September, 1909.

B. D. WHITE, [SEAL.]
*Presiding Judge of the Circuit Court
of the County of Norfolk, Virginia.*

Bill of Exceptions No. 3.

Be it remembered, that on the trial and hearing of this cause, upon the motion of Arthur W. Depue to confirm the report of the commissioners theretofore appointed to ascertain the just value of so much of the land whereof the Bay Shore Terminal Company was tenant of the freehold, came the Norfolk and Ocean View Railway Company, the purchaser of the property and franchises of the Bay Shore Terminal Company, pursuant to a decree of the Circuit Court of the United States for the Eastern District of Virginia, in *Charles E. Fink v. Bay Shore Terminal Company and others*, claiming to appear specially for the purpose of said motion, and moved the court, prior to the confirmation by the court of the report of said commissioners, to vacate, dismiss and discontinue said proceedings theretofore had in this cause, which said motion of the Norfolk and Ocean View Railway Company, claiming to appear specially for that purpose, the court overruled, to which action of the court in overruling said motion, the said Norfolk and Ocean View Railway Company excepts, and prays that this, its Bill of Exceptions No. 3, may be signed, sealed and made a part of the record herein, and the same is accordingly done, this 29th day of September, 1909.

B. D. WHITE, [SEAL.]
*Presiding Judge of the Circuit Court
of the County of Norfolk, Virginia.*

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Bill of Exceptions No. 4.

Be it remembered, that on the trial and hearing of this cause, upon the report of the commissioners appointed to ascertain a just compensation for the land sought to be condemned, filed herein on June 20th, 1906, and the exceptions thereto, together with the motion of Arthur W. Depue to confirm said report, came the Norfolk and Ocean View Railway Company, the purchaser of the property and franchises of the Bay Shore Terminal Company, pursuant to a decree of the Circuit Court of the United States for the Eastern District of Virginia, in *Charles E. Fink v. Bay Shore Terminal Company and others*, and moved the court that it do not confirm that portion of the report of the said commissioners that finds and ascertains that a just compensation to all persons or corporations having any interest in, or claims against, or liens upon the land in the petition and proceedings in this cause mentioned, to be the sum of \$57,200.00, which said amount was ascertained by said commissioners to include not

only the value of the land, but the improvements placed thereon, and shown by said report, by the said Bay Shore Terminal Company after the purchase of the same by said Bay Shore Terminal Company, which motion of the said Norfolk and Ocean View Railway Company, the court overruled, to which said action of the court in overruling the said motion, the said Norfolk and Ocean View Railway Company excepts, and prays that this, its Bill of Exception No. 4, may be signed, sealed and made a part of the record herein, and the same is accordingly done, this 29th day of September, 1909.

B. D. WHITE, [SEAL.]

*Presiding Judge of the Circuit Court
of the County of Norfolk, Virginia.*

Bill of Exceptions No. 5.

Be it remembered, that on the trial and hearing of this cause, the Norfolk and Ocean View Railway Company, purchaser of the property and franchises of the Bay Shore Terminal Company, under the decrees of the Circuit Court of the United States for the Eastern District of Virginia, by which said property was sold, which said company, as such purchaser, succeeds to all the rights and liabilities of the plaintiff herein, moved to vacate and dismiss the proceedings heretofore had in this cause, claiming in such motion to appear specially for said purpose, and for no other, and also moved that the court discontinue these proceedings for the reasons set forth

82 in said motion, and upon the overruling of both said motions, said Norfolk and Ocean View Railway Company thereupon appeared by counsel on the hearing of the exceptions to the report of said commissioners, filed on the first day of May, 1906, whereupon the court overruled the motion of said Norfolk and Ocean View Railway Company to vacate and dismiss said proceedings, and also overruled its said motion to discontinue said proceedings, and further decided that by the acts of the said Norfolk and Ocean View Railway Company it had appeared generally and made itself a party to these proceedings, as successor to the interests of the plaintiff and petitioners herein; and to this action of the court in overruling said motion and deciding that it had appeared generally in these proceedings and become a party thereto, said Norfolk and Ocean View Railway Company excepts, and prays that this, its Bill of Exceptions Number 5, may be signed, sealed and made a part of the record herein, and the same is accordingly done, this 29th day of September, 1909.

B. D. WHITE, [SEAL.]

*Presiding Judge of the Circuit Court
of the County of Norfolk, Virginia.*

Bill of Exceptions No. 6.

Be it remembered, that on the trial and hearing of this case, upon the motion of Arthur W. Depue to confirm the report of the commissioners theretofore appointed to ascertain the just value of so much of

the land whereof the Bay Shore Terminal Company was the tenant of the freehold, said Arthur W. Depue, by counsel, moved the confirmation of that portion of the report of the commissioners, filed on the 29th day of June, 1906, that finds and ascertains that a just compensation to all persons or corporations having any interest in, or claim against, or lien upon the land and property in these proceedings mentioned, is the sum of \$57,200.00, and that the said Norfolk and Ocean View Railway Company should, in addition, pay interest on the said sum at the rate of six per cent. per annum from the date of the entry of the order directing the same, and further moved that the said Norfolk and Ocean View Railway Company should within three months from the date of the entry of such order deposit in some National Bank or National Banks in the City of Norfolk, Virginia, to the credit of this cause, and subject to the order of the court in this cause, the sum of \$57,200.00, with interest as aforesaid, from the date of said order, and the certificate or certificates of deposit therefor it should deliver to the clerk of this

83 court, to be held by him subject to the order of the court herein, and that the said Norfolk and Ocean View Railway Company should further pay into court the costs attending these proceedings, to which motion the said Norfolk and Ocean View Railway Company, claiming to appear specially for said purpose, objected, which objection being overruled, the said order was entered the 6th day of Aug., 1909, in accordance with the motion of the said Arthur W. Depue, the said Norfolk and Ocean View Railway Company excepts, and prays that this, its Bill of Exceptions No. 6, may be signed, sealed and made a part of the record herein, and the same is accordingly done, this 29th day of September, 1909.

B. D. WHITE, [SEAL.]
*Presiding Judge of the Circuit Court
 of the County of Norfolk, Virginia.*

Bill of Exceptions No. 7.

Be it remembered, that on the trial of this cause, the defendant having introduced in evidence H. L. Page and C. N. Drummond, and the plaintiff having introduced the witnesses, H. R. Palmer and J. A. C. Groner, the evidence given by them, and the documentary evidence hereinafter referred to and recited, being all of the evidence introduced, which evidence was made a part of the report of the commissioners, and is as follows:

Evidence Taken Before the Commissioners appointed in this Matter, and before Gertrude Barbrey, notary public, at the office of Judge Thomas H. Willeox, 209 Main Street, Norfolk, Virginia, on Wednesday, April 25th, 1900, at 11 o'clock A. M.

Present:

W. E. Conover, J. T. Miller, John Holland, John A. Lester, of commissioners appointed herein to ascertain and report what will be a just compensation, etc.

Judge Thomas H. Willeox, Messrs. J. Edward Cole, Tazewell Taylor and D. Lawrence Groner, counsel for receivers.

N. T. Green, Esq., counsel for Arthur W. Depue, a bondholder.

Richard McIlwaine, Esq., counsel for M. W. and Thos. 84: Talbot.

H. L. PAGE, a witness on behalf of Arthur W. Depue, being first duly sworn, deposes and says as follows:

Examined by Mr. Green:

Q. State your age and occupation?

A. Forty-five; Norfolk; real estate.

Q. How long have you been a real estate agent in Norfolk?

A. Twenty-six years.

Q. Are you familiar with the city and its surrounding sections?

A. I am, yes, sir.

Q. Are you acquainted with the values of property in the city and its surrounding country?

A. I think I am.

Q. Are you acquainted with the right of way sought to be condemned in this proceeding?

A. Yes, sir.

Q. State if that right of way is adaptable for street railroad or suburban railroad purposes between the City of Norfolk and Ocean View?

A. Yes, sir, it is the best right of way between Ocean View and Norfolk.

Q. I mean, now, considering it as if no railroad were there, does it possess any peculiar adaptability?

A. Yes, for the matter of small cost, it is the best route between Norfolk and Ocean View.

Q. Has it any other adaptability excepting that?

A. By reason of shortness of route and bridging.

Q. How about passengers?

A. It would have additional passengers by reason of going along that road.

Q. How many acres are in that strip of land, Mr. Page?

A. I think a little over twelve.

Q. Considering the adaptability of this strip, if any, for railroad purposes, and considering it for all other purposes together therewith, what was the market value of that strip of land in May, 1902?

A. Well, now, you are leaving out the power-house piece, I understand?

Q. Yes, leaving that out?

A. Well, I think the strip of land in 1902, I thought it was worth about \$18,000.00 to \$20,000.00, about \$18,000.00. We agree to sell the whole piece including the town piece, for \$25,000.00.

Q. What is the market value of that strip of land to-day, considering its adaptability for railroad and other purposes, if any, and regardless of the fact that the street railway is laid there at all?

A. Well, I think it is worth \$30,000.00 to-day. It has increased that much.

Q. What position do you occupy in the Consolidated Turnpike Company?

A. Their president.

Q. Can you say whether the travel has increased on that turnpike, or decreased, since the street railway was laid thereon, I mean the tolls?

A. Well, they have decreased. That was the pleasure road, you know, the pleasure travel won't seek a road where it has a railroad. Of course the farmers come along there the same, but the pleasure travel has decreased. Our Sunday tolls used to be \$18.00 to \$20.00, and now sometimes it is only \$2.00 or \$3.00. In other words, the pleasure driving seeks other roads; the Cottage Toll Bridge gets the greater amount of the pleasure travel.

By Commissioner McCARRICK:

Q. Mr. Page, does that strip of land include all the right of way to Ocean View?

A. No, to Lynnhaven Avenue.

(Mr. GREEN:)

Q. Now, Mr. Page, you have given the value of the land itself. Do you know the value of the rails and materials there as of to-day?

A. The value of them?

Q. Yes.

A. You mean what they cost?

Q. No, I want the value as they are there to-day on the ground?

A. Well, that is right hard to say. The cost, I should judge, on that piece of land about \$40,000.00. I suppose if you had to tear them up and sell them, I reckon 50 cents on the dollar would be about a fair valuation all the way through.

Q. About \$20,000.00 then?

A. About.

Q. That is if you tore them up and sold them?

A. Yes.

Q. They would have some value, wouldn't they, if they were left there to the turnpike for a railroad?

A. Of course if you could sell them as they stand, you could sell them, I suppose, for what they cost because material has so greatly

increased that the deterioration as they are would offset the increase over what they cost when we bought the stuff.

86 By a COMMISSIONER:

Q. That is, if you could use them as they are on the ground?

A. Yes, not tear them up.

(Mr. GREEN:)

Q. Are you familiar with the tract on which the power house is located?

A. Yes, sir.

Q. How many acres in that tract?

A. My recollection is that there was a little over two acres, that is, with the marsh; one and nine-tenths acres of high land, and all together about two and one-half acres.

Q. What was the value of that two and a half acres in May, 1902?

A. Well, I figured it would be worth about \$2,000.00 at that time.

Q. That is, in May, 1902, for the power house tract?

A. Yes, sir.

Q. Did you consider its adaptability for power-house purposes?

A. I suppose—I considered what it would be worth to the railway company, including all purposes.

Q. What would that be worth for the naked land without the power house, or considering the power house?

A. I suppose you could sell that piece of land to-day at \$5,000.00 or \$6,000.00, with the water front.

By COMMISSIONER BACKUS:

Q. How much did you say it was?

A. 2½ acres, including water front you could sell it to-day for about \$5,000.00 or \$6,000.00. The man across the street there wants \$30,000.00 for six acres.

Judge Willcox objects to the witness making any statement as to the man across the street, because same is not proper testimony.

(Mr. GREEN:)

Q. Do you know what the property opposite this is valued at?

Same objection.

A. \$30,000.00.

Q. What is the value, do you think, of it?

A. I think I could sell the six acres and the water for \$15,000.00. I'll tell you this, I went down the road there and tried to buy ten acres and couldn't buy ten acres anywhere on it at \$5,000.00.

Same objection.

87 Q. How long ago is it since you tried to buy this?

A. About five or six months.

By Commissioner BACKUS:

Q. Do you mean ten acres in a strip of land, or how?

A. No. I never want to try to get any more strips as long as I live. I tried to buy it as a home.

(By Mr. GREEN:)

Q. As a matter of fact, you can buy as a whole better than in strips?

A. Yes, indeed. If you don't want to get into a lunatic asylum, don't ever try to buy any strips around here.

Q. Do you know the value of that building and the machinery affixed to the building?

A. I know about rough what it cost.

Q. What is it?

A. There is a brick power house, stood us between \$5,000.00 and \$6,000.00, and there is a car barn there that cost us about \$2,000.00. Then there is machinery in there that cost about between \$50,000.00 and \$60,000.00.

So much of the foregoing answer as gives the cost of this property is objected to, because the cost is no criterion of the value of the property at this time, and its value at present is what the commissioners are directed to inquire into and report.

(Mr. GREEN:)

Q. Mr. Page, is the machinery you speak of affixed to the freehold, that is, to the house, permanently?

A. It could be taken out.

Q. How could it be taken out?

A. It could be taken out and sold, placed somewhere else.

Q. Without injury to the freehold, to the building, tearing down some part of the building that is affixed to the land.

A. No, not without taking up something.

Q. That is what I mean.

By Judge WILLCOX:

Q. Isn't it put down by screws?

A. Yes.

Q. Couldn't you unscrew it?

A. Yes, you could unscrew it. They are built on a bed and bolted and screwed to a bed.

88 (By Mr. GREEN:)

Q. What did you say the machinery cost?

A. From \$50,000.00 to \$60,000.00.

Same objection as heretofore, to cost.

Q. What is the value of the buildings, their present value?

A. Well, for what purposes?

Q. Just as they stand on the ground, for any purpose?

A. It is hard to tell what it could be used for. Do you mean if you took the power house away?

Q. I mean the building for any purpose. What is the value of a building like that, there, to-day?

A. I think if you took the railroad away you would have to cut it in half, worth about half.

Q. The building would be worth about half what it is?

A. Yes.

Q. What would they be worth with a railroad there?

A. Every dollar we paid for them.

Q. Well, I am not basing the value on the rental or what you could use it for, but what is the value of the material, of the house as it is to-day?

A. You could not replace it for the same we paid.

Q. So far as the value of the building and material as it is to-day, you could not replace it for what you put it there?

A. I suppose you would have to pay 25 per cent. more than when we put it up.

Q. This loss of tolls on your road; to what do you think it is attributable?

A. To the pleasure travel. The pleasure travel seeks a road where there — no railroad along.

Objection, by Judge Willcox, as inadmissible.

Q. You mean that the railroad is a menace to such travel as you have there?

Same objection.

Q. Do you mean the road is a menace in the way that they are frightened to go where a car goes, with horses?

A. For pleasure, certainly. You take a lady or children and they won't seek a railroad for pleasure travel.

89 By Judge WILLCOX:

Q. You have lost the pleasure travel?

A. Well, lots of gentlemen too, will go the other way, for that matter; anybody driving. It's dusty for one thing, and not as pleasant with a railroad there as without it.

Cross-examination.

By Judge WILLCOX:

Without waiving any objections heretofore made.

Q. Mr. Page, you have spoken of the loss of tolls on the Indian Poll Turnpike as compared with the Cottage Toll Bridge Turnpike. Isn't it a matter of fact that there are a great many more people living along the Cottage Toll Bridge Road than along the Indian Poll Bridge Road?

By Mr. GREEN: Which is the road here?

Mr. WILLCOX: The Indian Poll.

A. Yes.

Q. And doesn't that increase the travel there?

A. Yes.

Q. Isn't it a fact that the Norfolk Horse Show & Fair Association has its buildings and race track out there?

A. Yes, but that isn't going on all the year.

Q. Isn't all the horse show travel on that road?

A. Yes, and the receipts may go up for just that week, the week of the horse show.

Q. Isn't it a fact that on the Indian Poll Turnpike that from Tanner's Creek to Freiburg Crossing the property is all owned by the Talbots, except a piece of Mr. John Cromwell's?

A. Yes, but the Talbots rent it out and we haven't lost any farmer travel at all, except when they take the car. When they drive, they go by our road, of course.

Q. What you have lost is the pleasure travel?

A. Yes, and the Ocean View travel.

Q. Well, wasn't your road to Ocean View opened after you acquired the turnpike?

A. What do you mean?

Q. After you purchased the road, didn't you extend it to Ocean View?

90 A. Yes.

Q. And didn't the people always go, before that, the other way to Ocean View?

A. The majority of the travel before that, yes.

Q. Isn't it a fact that on the Cottage Toll Bridge road the property was much more largely occupied by the owners than on Tanners Creek road?

A. Well, it is just about the same, now that John Simpson is living there.

Q. You say that a railroad always hurts a turnpike. As a matter of fact, don't it improve it by improving the property along it?

A. I think for the first three or four years a trolley road goes along a turnpike it injures the road, but after a while people build there because of the trolley. That has been my experience.

Q. You owned the turnpike when it was only about 30 feet?

A. Yes, sir.

Q. And you acquired 25 feet more?

A. No, thirty feet more.

Q. For what purpose did you acquire it?

A. For leasing.

Q. Not for railroad purposes?

A. Or for railroad purposes, or bicycle purposes was what we thought of.

Q. In other words, having a turnpike 30 feet wide, you went to work and purchased 30 feet addition for the purpose of renting for a purpose which would hurt your turnpike?

A. Well, we found that out afterward. We didn't know it at the time. We learned from experience.

Q. At that time, when you conveyed this right of way to the railroad, you were interested in both companies?

A. Yes, sir, was president.

Mr. Green objects to question as immaterial.

Q. You owned some of the bonds and stock of the turnpike?

A. Yes, sir.

Q. And you made the contract by which they let the Bay Shore have this right of way for \$22,500.00 in bonds and \$5,600.00 in stock?

A. Yes, sir.

Q. And in your judgment, the property was worth at that time \$5,000.00 for the part in the city, \$18,000.00 for the part outside the city, and \$2,000.00 for the power house tract?

A. That is my proportion.

Q. You say that the land from Tanners Creek to Lynnhaven Avenue is worth \$30,000.00 to-day?

A. Yes, sir.

Q. What do you consider the residue of the land worth to-day?

A. It is hard to sell. Do you mean—

Q. I mean the 35 feet adjoining this 25?

A. Well, if you were let alone and the tolls went on as they had been, it would be worth \$35,000.00 to \$40,000.00.

Q. What did you pay in 1901 before you sold this portion of the turnpike to the Bay Shore; for the whole turnpike what did you pay?

A. The whole thing cost us about \$25,000.00 for all, condemnations and everything. We bought two or three years before that.

Q. What did you buy when you bought it?

A. Well, the bridge was rotten, and we paid \$12,000.00 for it as we bought it.

Q. What did you put on it after you bought?

A. A new bridge over Tanners Creek.

Q. At what price?

A. I can't say exactly. \$4,000.00 or \$5,000.00.

Q. Considering that the bridge was worthless when you bought it, you paid \$12,000.00 from Freibus' Siding to the city?

A. Yes, sir.

Q. What did you pay for the 25 foot strip when you acquired that?

A. I don't really recollect. Which piece, Judge?

Q. What you acquired afterward?

A. I think the whole thing stood us about \$25,000.00, about; grading and bridge and everything.

Q. That is what the whole thing cost you, \$25,000.00?

A. That is not positive, but what I have in my mind is about \$25,000.00 for everything.

Q. Extending the turnpike from Freibus' Store to Lynnhaven Avenue, acquiring the additional 30 feet, putting up the new bridge, and what you paid out, the whole thing stood you \$25,000.00?

A. About that.

Q. What did the bridge cost?

A. \$4,000.00 to \$5,000.00.

Q. What did the portion from Freibus' Store to Lynnhaven Avenue cost you?

A. A portion of that was given.

92 Q. That was given to you?

A. A portion of it.

Q. In 1902, when you made this conveyance to the Bay Shore Terminal Company, you got from them for that strip of 25 feet, what the whole thing had cost you?

A. That may have been what it cost us in money, but you remember there were two solid years of work. You get some rights of way once, and put in your time getting them and see what it comes to.

Q. You sold the 25 feet for \$25,000.00 in 1902, and that was what the whole thing had cost you?

A. We haven't got anything for it yet.

Q. You testified you thought these bonds were worth par?

A. They were selling at par and we believed we were getting \$25,000.00, what we asked for the right of way, and we haven't gotten anything.

Q. They were selling for par and you have gotten that?

A. We haven't got a cent except some bonds and stock.

Q. You got that?

A. Oh, yes, we got it all right; I wish we hadn't.

Q. You spoke of this strip of land being worth \$30,000.00. Did you mean to the railroad?

A. Taking into consideration railroad purposes and everything.

Q. Suppose you don't use it for a railroad, is it worth anything?

A. Well, it would be worth what the adjoining property owners—

Q. What would your turnpike deed it back for?

Question objected to by Mr. Green, upon the ground that witness must take into consideration all purposes, railroad and all purposes.

Q. Certainly, and for turnpike purposes. Now what would you give for turnpike purposes for it?

A. I don't know.

Q. What would you give? Would you give \$30,000.00?

A. No, I wouldn't, because I don't want it.

Q. If you wanted it for any purpose whatever?

A. If I were going to build a railroad, I would give \$30,000.00 and think it cheap.

Q. What would it bring in the open market?

A. I don't know.

Q. If it were put in the market at the Real Estate Exchange tomorrow, what would it sell for?

A. Well, it would depend upon who wanted it.

93 Q. What would it bring at public auction?

A. If two railroads were wanting it, it would bring more than that, probably.

Foregoing questions as to what the property would bring at public auction are objected to by Mr. Green, as not being a criterion of market value.

By Mr. WILLCOX: I think it does show the market value.

- A. (Continuing:) It is valuable there to these farms.
- Q. You didn't convey anything but a right of way?
- A. We conveyed it, yes.
- Q. You didn't have anything but a right of way between Friebus' Store and Tanners Creek?
- A. I think West gave us a deed.
- Q. Then, I know that's all you got, if West conveyed it, wasn't it?
- A. We got a deed.
- Q. What you got is practically a right of way?
- A. Practically, that is all.
- Q. Now, if you only got a right of way, it would sell only to a turnpike or a railroad, wouldn't it?
- A. As far as I see, it would.
- Q. And has it any value for a turnpike?
- A. Of course.
- Q. Would it pay another turnpike to locate along yours, by the side of it?
- A. No, I think not.
- Q. Would it pay your company to add to its width?
- A. We ought to have five feet more.
- Q. It wouldn't pay you to buy 25 feet to get 5 feet?
- A. No—but—
- Q. You have all you need, haven't you—
- A. My experience is we should have forty feet.
- Q. And the only thing this could be bought for is a railroad?
- A. In my opinion, yes.
- Q. Suppose the Bay Shore Railroad should be purchased by the Norfolk Railway & Light Company, and they should abandon this line; would there be any value to that strip of land from Tanners Creek to Ocean View, as a separate right of way?
- A. Not unless the Chesapeake Transit or Atlantic Terminal wanted it.
- 94 Q. You said the machinery could be taken away from the power house. Suppose you took the machinery away from the power house tract and let the railroad forfeit its rights, what would the building sell for?
- A. I think 50 cents on the dollar.
- Q. If you were going to buy that tract for a beautiful home, would you want the power house on it?
- A. No, of course not.
- Q. In order to sell the land for anything except a power house, you would have to get rid of the buildings?
- A. I think you have, unless a manufacturing plant wanted it. If it were wanted for a factory or something of the sort, it might be used.
- Q. If you wanted it for a home?
- A. Oh, if I were going there to-day for a residence, I would give \$10,000.00 for it without the building rather than \$5,000.00 with the building on it.
- Q. It would be damaged for a home site, with the building on it?
- A. Yes, it would have to be removed for that purpose.

Redirect examination.

By Mr. GREEN:

Q. When you speak about the value of that building there, in answer to Mr. Willcox you said that it would be worth 50 cents on the dollar; you spoke of its rental value?

A. Yes, sir.

Q. What is that building worth as a building, regardless of the use it might be put to?

Question objected to (by Mr. Willcox) on the ground that the value of a building is determined entirely by the use of it; otherwise it is only valuable for the bricks and timber and other material in it.

A. I think the building is worth, as it stands, \$8,000.00, every dollar of it; couldn't be put there to-day for \$8,000.00.

Q. You said something about the land not being used for railroad purposes. Suppose the Bay Shore Railroad was not in existence. Ocean View is in effect a suburb of the City of Norfolk?

A. Yes.

Q. Increasing in population all the time?

A. Yes.

95 Q. Naturally, it may be supposed railroads will seek to connect Ocean View with Norfolk?

A. Very natural.

Q. With that end in view, and considering the fact that people will seek connections between Ocean View and Norfolk; is this strip peculiarly adaptable for railroad purposes?

A. As I have said, it is the very best route to Ocean View.

Q. So that if the Bay Shore weren't in existence at all, it is the best route.

A. I believe if the Norfolk Railway & Light purchased it tomorrow, they would abandon the other route and take this route.

Q. Considering that fact, considering that it is of such adaptability, and everything else, what is the market value of that land—leave out the farming purposes, if you want to?

A. I have stated that in 1902 it was worth about \$18,000.00, considering all purposes, and now considering the same it is worth \$30,000.00.

And further this deponent saith not.

C. N. DRUMMOND, a witness on behalf of Arthur W. Depue, being first duly sworn, deposes and says as follows:

Examined by Mr. GREEN:

Q. State your residence, age and occupation?

A. Fifty-two years old. I am a contractor and keep a toll bridge both.

Q. Do you keep the bridge yourself?

A. I am superintendent of it; I don't say there and collect the tolls, but I live at the toll bridge.

Q. Is that the toll gate——

A. The Tanners Creek.

Q. Where the Bay Shore is?

A. Yes.

Q. You have a man to collect the tolls there?

A. Yes.

Q. What has been the effect on the tolls of this turnpike since the erection of that railroad?

A. Well, when I first went there in 1900, December I think in that year, when the spring driving commenced we got all the way from \$10.00 to \$18.00 a week, according to the weather.

96 Q. A week?

A. No, not a week at all, I didn't mean that; a day, on Sunday; it's not a week at all, it's just Sunday travel that I am speaking of now.

Q. Well, what do you get there now?

Judge Willcox objects to both the foregoing questions, on the ground that the best evidence of what tolls have been taken in would be the books of the company, and further, because evidence as to the tolls taken in by the Consolidated Turnpike Company is not admissible or relevant in this issue, the Consolidated Turnpike Company having acquired this right of way for the purpose of selling it to an electric railway for railway purposes.

Q. What are the tolls to-day?

A. Anywhere from \$3.00 to \$7.00 a Sunday. I was speaking of Sunday trade because that is the only pleasure travel we have.

Q. And is that the only travel that has been affected by this road?

A. I think so, only the pleasure travel.

Q. What was that decrease in the tolls due to—to the road?

A. I can't tell, except that it was due to people not traveling.

Q. Well, what caused that?

By Judge WILLCOX: How can he tell why people don't travel?

A. I know several have told me, Mr. Duvall for one, that his horse was afraid, and several told me that was the reason they didn't drive that way too.

Q. In your opinion the road is the cause of the decrease in the tolls—the railroad?

A. I think so, and because they could go cheaper than in a buggy, on the cars.

Cross-examination.

By Judge WILLCOX:

Q. Isn't that the same man who has given his farm to the electric railway?

A. Mr. Duvall? Yes.

Q. He has gotten over his fear?

97 A. Well, he don't have to drive now, he comes on the road, comes free, I guess.

Q. Do you collect the tolls from the bridge?

A. No, I have a man.

Q. Where is the book where the tolls are kept?

A. I have it here.

Witness produced book referred to and examination proceeds upon the book.

Q. Now, show me a Sunday when it was \$25.00 for tolls?

A. I didn't say that.

Q. Mr. Page said that.

A. Well, I ain't talking for Mr. Page.

Q. Well, show me \$18.00 a day. If you want some time to look it up, I will excuse you very willingly?

A. No, it takes no time at all. Here is for May, 1901. There is the amounts: \$6.07, \$15.88; \$18.00; \$13.79; \$4.81.

Q. When was that \$4.81?

A. That's all on Sundays.

Q. And that was in May, 1901, only \$4.81.

A. Well, of course sometimes when it rained.

Q. Now, here on May 5th, 1901, you have got \$15.88?

A. Yes.

Q. May 12th, \$18.10?

A. Yes, sir.

Q. May 19th, \$13.79?

A. Yes, sir.

Q. May 26th—

By COMMISSIONER:

Q. That was before the railroad?

A. Yes, sir.

Q. On the 26th of May, what was that?

A. Sunday.

Q. What were your receipts that day?

A. \$4.81.

Q. In other words—

A. That was rain.

Q. You can swear now that it rained on Sunday, May 26th, 1901?

A. Yes, sir, I can swear that was the reason I didn't get more on that day, because I always got more when it didn't rain, and I can produce the weather reports for that date, if necessary.

98 Q. On the 6th of May, \$6.30?

A. Yes.

Q. On the 13th, \$6.03?

A. Yes.

Q. On the 28th of May, a week day, \$33.06?

A. Yes, sir.

Q. You mean to say that you took in that much money on one day, and a week day?

A. Certainly, people were coming in more.

Q. Was that a rainy day?

A. That was a nice day for me, anyhow.

Q. So that your receipts in 1901, in May, varied as much as from \$18.00 to \$4.00 on Sunday?

A. Certainly.

Q. And in the week from as much as \$33.00 to \$4.00?

A. That \$33.00 was where people paid up what they owed me.

Q. Here is \$28.00 for another day?

A. I can turn over and find where a man paid that for what he owed me.

Q. You can tell the commissioners then, that your receipts varied this much before the road was there?

A. That was paid up where sometimes it had been owing a week. Sometimes they all paid in one day. These commissioners know about that; these gentlemen come along that road often.

By a COMMISSIONER:

Q. Did you sell tickets, Mr. Drummond?

A. (continued). There are some places where Mr. Cooper paid me \$45.00; one time he bought \$45.00 worth of tickets.

(MR. WILLCOX:)

Q. Mr. Drummond, Mr. Page has testified that the entire turnpike cost them \$25,000.00. He has also testified that they sold this strip of land to the Bay Shore Railroad for what he considered at that time worth \$25,000.00. He has further testified that the remaining part of the turnpike is worth to-day \$30,000.00. So, according to Mr. Page's statements, although they have sold \$25,000.00 worth of property and although you say the receipts have fallen off so considerably, the entire turnpike would be worth \$5,000.00 more than what it originally cost. Can you explain how that is?

A. Yes, in one way.

Q. How?

A. I can explain it only one way, and that is, I say I am not a judge of valuations.

99 Radirect examination.

By Mr. GREEN.

Q. You say there had been some variations in your travel before this road was run, and that it was due, I understood you to say, to the weather?

A. Certainly, nobody drives in rainy weather.

Q. Taking the whole time, good weather and bad, it has decreased—

A. A very great deal as compared with what they used to be. I couldn't tell you exactly without figuring up my book.

And further this deponent saith not.

E. S. ELEY, a witness on behalf of the receivers, being first duly sworn, deposes and says as follows:

Examined by Mr. WILLCOX:

Q. Mr. Eley, where do you reside?

A. Norfolk.

Q. What is your occupation?

A. Civil Engineer.

Q. Are you connected with the Norfolk Railway & Light Co.?

A. I am.

Q. How long have you been connected with that company?

A. Nearly four years.

Q. Have you had any previous experience in connection with electric railways?

A. I had.

Q. How long?

A. I have been connected with railroads and electric roads about since 1888.

Q. Mr. Eley, the evidence shows in this case that the ties and poles have been here about four years on the average. Will you please say to these gentlemen what, in your judgment, whether or not those ties have any value to take up and sell?

A. I don't know whether they have any value or not. I was riding along there the other day and a good many of them are in right bad fix, and some no account at all.

Q. Would a tie in use four years have any market value, except that it was an exceptional tie?

100 A. I judge if you moved it you could not use it at all.

Q. With reference to the poles: if they were taken up after four years—

A. I expect it would cost about as much to move them as to buy new.

Q. Well, how about the overhead construction; do you know anything about that?

A. No, I am not familiar with that part of it.

Q. Have you had any experience with trestling?

A. Yes, sir.

Q. Charred cypress piles, not creosoted, how long is their life?

A. Depends upon where they are.

Q. Well, say in Tanners Creek?

A. With reference to moving them?

Q. Would they have any value? Could you get them up at all?

A. O, yes, you can pull them up.

Q. Would the cost be as much as they cost?

A. I suppose about the same as they would cost.

Q. Suppose the Bay Shore Terminal Company should abandon its track and cease to use it as a railroad, would the piles in the creek have any market value?

A. I suppose you could sell them for something if somebody wanted them.

Q. Would it amount to anything of the value?

A. I think not. We wouldn't pull up a trestle right near there, because it cost so much.

Q. The cost was more than it was worth?

A. Yes.

Mr. Green objects to foregoing testimony as to material pulled up and sold, on the ground that what is being valued here is improvements in place.

Q. With reference to machinery which you cease to use in your railroad: is there any value to it?

A. Yes, some.

Q. As machinery?

A. I couldn't tell you about that.

And further this deponent saith not.

H. R. PALMER, on behalf of the receivers, being first duly sworn, deposes and says as follows:

101 Examined by Mr. GREEN:

Q. Where do you live?

A. Norfolk.

Q. Connected with the Norfolk Railway & Light Company?

A. Yes, sir.

Q. What capacity?

A. General Superintendent.

Q. How long have you been occupying that position?

A. Going on two years.

Q. Are you familiar with the cost and value of material used in the overhead construction of electric roads, such as iron wire and copper wire?

A. Yes, sir.

Q. What is the market value of that material after it has been used?

By Mr. GREEN: Do you mean in place or torn down and removed?

By Mr. WILLCOX:

Q. I mean if you take it down and sell it, what is it worth?

By Mr. GREEN: I object to that on the ground that what they are valuing here is the articles in place and not taken down.

Q. I will change my question. What would it be worth if in position, if the railroad ceased to use it?

Same objection by Mr. Green.

Q. Answer the question?

A. It would be worth scrap value.

Q. And if you took it down it would not be worth any more than scrap value?

A. No, because you would have the expense of taking it down.

Q. With reference to the machinery. What is the market value of machinery after you cease to use it? Can you sell it?

A. Occasionally.

Q. Is there any such market for it as would enable you to put a price on it?

A. No, there is not.

Q. Now, the overhead construction, the cross-wires and feed-wires can be taken down?

102 A. Yes, sir.

Q. They are not attached to the ground?

A. No.

Q. And the machinery in the power house can be taken down without tearing up the foundation?

A. Yes, sir.

By Mr. GREEN:

Q. That is built to receptacles attached to the foundations, isn't it?

A. In case of boilers.

Q. How about the other?

A. It is just bolted to the foundation.

By a COMMISSIONER:

Q. The machinery was put in after the foundation was laid, wasn't it?

A. Yes, sir.

Q. And if it was put in after the foundation was laid, it could be taken out — disturbing the foundation?

A. Yes, sir.

And further this deponent saith not.

J. A. C. GRONER, on behalf of the receivers, being first duly sworn, deposes and says as follows:

Examined by Judge WILLCOX:

Q. Mr. Groner, you are one of the Receivers of the Bay Shore Terminal Company, are you not?

A. Yes, sir.

Q. And have been general manager since the company commenced operation?

A. Yes, sir.

Q. And secretary almost since its organization?

A. Yes, sir.

Q. You have been connected with it since the railroad was organized?

A. Well, since about six months after that.

Q. Are you familiar with the construction of the railroad between here and Ocean View?

A. Perfectly.

103 Q. How are the rails fastened to the ties?

A. Spiked down.

Q. Would it be any trouble to pull the spikes out and take the rails up, if you chose?

A. No, sir.

Q. And is that true as to the overhead construction?

A. Yes, sir.

Q. Any trouble about taking up the machinery without interfering with the foundations?

A. Everything there could be taken out within a week without hurting the foundation.

By Mr. GREEN: No trouble about moving the house and putting it somewhere else.

By Mr. WILLCOX: That would be moving the foundation too, wouldn't it?

Q. With reference to the piles there, from the channel, on the other side, is very little trestling, isn't it?

A. Probably only thirty feet.

Q. Of no value of any kind except to the turnpike company?

A. I don't think it is of any value to anybody.

Q. What is the condition of the poles between here and Ocean View?

A. There are in very much worse condition than the ones in the Norfolk side, because we were in a hurry to build the road, and we were rather rigid in our inspection on the Norfolk end, in throwing out material; the material wasn't as expensive then, and out of every carload of 50 poles we throw out about half. The poles were \$2.50 and then we offered a fellow fifty or sixty cents for condemned poles, and the result was we got a whole lot of small poles not as good by any means, and I think the poles down that end are in pretty bad condition.

Q. What is the ordinary life of poles?

A. Five to seven years.

Q. And these have been in use four years?

A. Nearly five years.

Q. So that the utmost remaining service of them would be two years?

A. I don't think as much as that hardly.

Q. Were you interested in the company which acquired a right of way from Ocean View towards the Exposition Grounds?

A. Yes, sir.

104 Q. What was the width of that right of way?

A. It was mostly in beds of streets and avenues, and rather wide.

Question and answer objected to as irrelevant.

Q. Had there been any complaint made by the turnpike company as to any injury it suffered from the trolley line operating along its road?

A. None in the world that I know of. The road has its power house just 100 yards in the toll gate, and we have to pay for every ton of coal we haul in there, and I think it is somewhat of a money-maker rather than an injury.

Q. What does your toll bill amount to?

A. To a whole lot; it is perfectly amazing. I could not tell you exactly without the books.

Q. How many tons of coal do you use per day?

A. Six tons a day, forty-two tons a week, 180 tons a month, on the average.

Q. What do you pay toll on that?

A. The toll the fellow has to pay is ten cents. We pay him fifty cents and he pays ten cents, because he said he could haul it for forty cents if he didn't have to pay toll. He may have some small deduction on account of buying tickets.

Q. That would be about \$18.00 a month you have increased their toll by hauling coal, to say nothing of everything else?

A. Yes, about that.

Cross-examination.

By Mr. GREEN:

Q. You could haul that coal over your railroad and not pay anything, couldn't you?

A. We might do it by the next three years, when the Tidewater railroad gets there. If we could get physical connection there we could haul it. We cannot haul it by the Norfolk & Western, as it is now.

And further this deponent saith not.

The following statement was submitted by Mr. Groner, after his examination, and admitted by counsel as part of his testimony:

105	Six and one-eighth miles of track from Tan- ners Creek Bridge, including all sidings, con- sisting of 561 tons of rail at \$28.00 per ton, F. O. B. Norfolk, total amount.....	\$15,708.00
105,700	ties at an average cost of 42 $\frac{3}{4}$ cents.....	451.87
401	poles at an average cost of \$2.25.....	902.25
		<hr/> \$17,062.12

There have been four new poles recently added at the Tidewater Crossing.

CORPORATION OF THE CITY OF NORFOLK, *To wit:*

I, Gertrude Barbrey, a notary public for the city aforesaid, in the State of Virginia, certify that the foregoing depositions of H. L. Page and others, were duly taken and sworn to before me, as evidence produced before the commissioners, appointed in the matter in the caption thereto mentioned, and on behalf of the parties as in said depositions set out, at the time and place therein stated.

Given under my hand this the 24th day of April, in the year 1906.

GERTRUDE BARBREY,
Notary Public.

My commission expires July 12th, 1906.
Fees for these depositions, \$21.00.

And the defendant, Arthur W. Depue, having filed at the hearing the petition and exhibits filed therewith, and the order entered thereon by the Circuit Court of the United States for the Eastern District of Virginia, and the opinion of the Circuit Court of Appeals of the United States for the Fourth Circuit in the matter of Norfolk and Ocean View Railway Company against Consolidated Turnpike Company and others in the suit of Fink v. Bay Shore Terminal Company and others, which said papers are as follows:

In the Circuit Court of the United States, Eastern District of Virginia.

106

In Equity.

CHARLES E. FINK

v.

BAY SHORE TERMINAL COMPANY et als.

Upon the Petition of Norfolk and Ocean View Railway Company.
Petitioner.

Upon reading the verified petition in the above entitled cause, and upon motion of counsel of the said petitioner, after notice to counsel for W. H. Taylor, trustee, for leave to file the same, it is ordered that the same be filed, and it is accordingly done; and it is further ordered that the complainant's motion for an injunction pursuant to the prayer of the bill be set down for hearing at ten o'clock A. M. at Norfolk, Virginia, before me, on the 1st Monday in May next, or as soon thereafter as counsel can be heard.

This being shown to be a case of emergency, it is ordered, adjudged and decreed that, until the hearing of said motion for an injunction and the further order of the court thereon:

(1st) That the defendant, Arthur W. Depue, his agents, and attorneys and all other persons, be, and they are hereby temporarily restrained, until the further order of the court, from prosecuting in the Circuit Court of Norfolk County any suit against the Consolidated Turnpike Company of Norfolk, Va., so far as *the* affects the property conveyed by the commissioners of this court in cause of Charles E. Fink v. The Bay Shore Terminal Company to the said petitioner; and that the said Arthur W. Depue, his agents and attorneys, and all other persons are restrained as aforesaid from prosecuting any other suit affecting the same; and Walter H. Taylor, trustee, the Consolidated Turnpike Company of Norfolk, Virginia, their servants, agents and attorneys, and all other persons are temporarily

restrained, until the further order of this court, from in any way disturbing or from doing any act or thing in any way affecting the possession, use and enjoyment by the said petitioner, the said Norfolk and Ocean View Railway Company, of that certain parcel of land leading from Norfolk to Ocean View, occupied by the said company as its right of way, and being the same which was conveyed to it by the commissioners of this court by decree of February 7th, 1907.

It is further ordered that a copy of this decree and of the aforesaid petition be served upon Walter H. Taylor, trustee, The Consolidated Turnpike Company of Norfolk, Virginia, and that copies of the same be served upon N. T. Green, of counsel for defendant, Arthur W. Depue, which shall be of the same effect as service upon said defendant in person.

And it is further ordered that the said defendants, and each of them, show cause before me in the City of Norfolk, Virginia, on the 1st Monday in May, 1907, at ten o'clock A. M., or as soon thereafter as counsel may be heard, why an injunction should not be granted as prayed in the said petition.

That process do forthwith issue upon said petition, directed to the defendants in said petition, and each of them, in accordance with the prayer of said petition, and service of said process upon N. T. Green, Esq., attorney of record, for Arthur W. Depue in the suit of Arthur W. Depue v. Consolidated Turnpike Company, mentioned in said petition, shall be in all respects service upon said defendant Arthur W. Depue.

(Signed)

EDMUND WADDILL, JR.,

U. S. Judge.

Richmond, Va., April 5th, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia.

In Equity.

CHARLES E. FINK

vs.

BAY SHORE TERMINAL COMPANY AND OTHERS.

Upon the Petition of Norfolk and Ocean View Railway Company against Consolidated Turnpike Company of Norfolk, Virginia; Walter H. Taylor, Trustee; Arthur W. Dupue, and the bondholders of the said Consolidated Turnpike Company of Norfolk, Virginia, and Tanners Creek Drawbridge Company, whose names are numerous and unknown, and who are herein made parties as parties unknown; the said Bay Shore Terminal Company, Atlantic Trust and Deposit Company, trustee, and Charles E. Fink.

To the Honorable Judge of said court, sitting in Equity:

Your petitioner, Norfolk and Ocean View Railway Company (hereinafter called petitioner), respectfully shows unto the court as follows:

(1) That it is a corporation duly chartered and organized under the laws of the State of Virginia for the purpose of purchasing, acquiring, taking over and operating the properties, assets and franchises of the Bay Shore Terminal Company (hereinafter for convenience called the Terminal Company) one of the defendants in this cause, which said property, assets and franchises were sold by a decree of this honorable court entered in this cause on the 17th day of March, 1906.

That being so organized and existing it did, by nomination of Edward B. Smith and Company, the purchaser at the said sale, at whose instance it was so chartered, and by compliance with the terms of said sale, receive from the special commissioners appointed by this honorable court by said decree of sale, a deed of conveyance which was approved by decree of this honorable court entered on the 7th day of February, 1907, in which said deed this honorable court, through its said commissioners of sale, conveyed among other things, to this petitioner "All of that certain railroad, railway, road-bed," etc., etc., * * * "Beginning at a point near Ocean View in the County of Norfolk, and extending thence southwardly to the City of Norfolk, Virginia."

That your petitioner, as assignee of the said purchasers of said property at said sale, has heretofore paid to the said commissioners of sale a large sum of money in consideration of the conveyance of the said property, to-wit: the sum of \$765,000.00, and has either paid, or assumed the payment of such an additional sum as may be necessary to discharge such claims held by various persons against the receivers of the said Terminal Company as may be declared by this honorable court, to be payable by it; has entered into possession of said property, rights and franchises, and is now engaged in the operation and enjoyment of the same as a public service corporation under the laws of the State of Virginia.

(2) That the defendant, Consolidated Turnpike Company of Norfolk, Virginia (hereinafter for convenience called the Consolidated Company) is a consolidated corporation, created by and existing under and by virtue of the laws of the State of Virginia, with the powers and privileges specified in its charter and the general laws of Virginia applicable thereto, to which reference is prayed. That for several years it has owned and operated a system of turnpikes in the County of Norfolk, and particularly a certain turnpike formerly owned by the Tanners Creek Drawbridge Company, extending from the City of Norfolk to a point at or near Ocean View in Norfolk County, on and over a part of which this petitioner is operating its said railroad between said points, and on a part of which its power house and car barns are located, the use of all of which is essential to the operation of the said road in the discharge of its duties as a public service corporation, and the deprivation of which will necessitate the abandonment of its line and the discontinuance of its operation.

(3) That the said defendant, Walter H. Taylor, is the trustee in two certain mortgages or deeds of trust, one executed by the said Tanners Creek Drawbridge Company on the 1st day of June, 1898,

prior to its consolidation, a copy of which said deed is hereto attached, marked "N. & O. N. R. Co. No. 1," and asked to be read as a part of this petition, and the second having been made and executed by the said Consolidated Turnpike Company of Norfolk, Virginia, on the 2nd day of April, 1900, a copy of which is hereto attached, marked N. & O. V. R. Co. No. 2," and asked to be read as a part of this petition.

(4) That the said defendant, Arthur W. Depue, is a citizen of the State of New York and a resident of the City of New York, and is the alleged holder of a large number of the bonds and stock of the said Consolidated Company, and the said Tanners Creek Drawbridge Company.

(5) That the defendant parties unknown are the holders of the said bonds of the said Consolidated Turnpike Company and the said Tanners Creek Drawbridge Company, who being both numerous and unknown, are hereby asked to be made parties as "parties unknown."

The Bay Shore Terminal Company, hereinafter called the Terminal Company, was incorporated under the laws of the State of Virginia on the 3rd day of March, 1900, for the purpose of constructing and operating a city and suburban railroad within the City of Norfolk and to a nearby summer resort known as Ocean View in the County of Norfolk. In pursuance of authority duly granted to it in its charter, it was duly organized by the election of H. L. Page as President, and the following directors: S. Q. Collins, W. C. Cobb, B. W. Leigh, T. H. Willcox, George L. Neville, W. W. Dey, F. W. Darling, T. C. White, H. L. Smith, H. L. Page, W. T. Simcoe, A. E. Krise, W. M. Rettew, F. L. Foster and M. W. Burke, and by a resolution of its stockholders, duly adopted, the proper officers of said company were authorized to purchase by proper deed of conveyance from the Consolidated Company a right of way eighteen feet wide extending from a point near the City Park in the City of Norfolk, Virginia, northwardly to Tanners Creek, and from Tanners Creek twenty-five feet wide northwardly to a point at or near Ocean View, together with the plot of land on which its said power house and car barns are now located, and the consideration agreed to be paid and actually paid for the same was \$22,500.00 of the first mortgage bonds of the said Terminal Company, and \$5,125.00 of stock of said company, together with certain other covenants and agreements to be done and performed by, and on the part of the said Terminal Company, all of which have been done and performed, and which are fully set out in the said deed from the said Consolidated Company to the said Terminal Company under date of March 1st, 1902, a copy of which is hereto attached, marked "N. & O. V. R. Co. No. 3," and asked to be read as a part of this petition. The said deed was executed by and on behalf of the said Consolidated Company in pursuance of a resolution duly adopted by the directors and stockholders of said company, the president of said company, at the time of the execution of said deed being the said H. L. Page, who was likewise the president of the said Terminal Company, and the following directors of the said

Consolidated Company, constituting a majority of the Board of Directors, were also, so this petitioner is advised and therefore charges, likewise directors of the said Terminal Company: H. L. Page, S. Q. Collins, B. W. Leigh, M. W. Burke, George L. Neville, A. E. Krise and F. W. Darling, the directories of both companies being therefore largely the same persons, and the bonds of said Consolidated Company being at said period almost entire- held by the members of said directorates, or persons represented, by them, who were also the holders of all of the stock of the said Consolidated Company then issued and outstanding, the said bond and stockholders being to all intents and purposes identical, and the action of the said stockholders as such being by and — behalf of the same parties as bondholders and for their benefits and advantage, as is shown by the terms of the said deed, in which it is specifically required that the consideration to be paid by the said Terminal Company should be forthwith turned over and delivered to the trustee in the said two mortgages or deeds of trust hereinbefore referred to from the said Tanners Creek Drawbridge Company and the said Consolidated Company to be held by him "primarily to secure the bond issued by the said Tanners Creek Drawbridge Company, and after that to secure the bonds issued by the said Consolidated Turnpike Company of Norfolk, Virginia." All of which will more fully appear by reference to the said deed, and in accordance with which the said securities were so deposited and held until the same were sold or exchanged by the said trustee for the benefit of said trust under a certain contract or agreement made between Foster, Simcoe and Cobb, Bay Shore bondholder committee, with Edward B. 111 Smith and Company, under date of January 25th, 1906, a copy of which is duly filed in this cause, and to which reference is prayed. And this conveyance by the said Consolidated Company to the said Terminal Company and the agreement whereby the consideration to be paid by the one to the other was submitted as security in the place and stead of the right of way conveyed by said deed, was done with the acquiescence, ratification and approval of all of the then bondholders of both the Consolidated Company and the Tanners Creek Drawbridge Company.

The said Walter H. Taylor, trustee, likewise approved on behalf of the beneficiaries secured in said trusts the said substitution of the one security for the other, and acting in behalf of the said trusts, has recently and within the last sixty days requested by mail of petitioner a plan of its financial arrangement, to the end that as such trustee he might elect whether to take cash or new bonds in accordance with the option in the Foster-Smith contract just hereinbefore referred to for the bonds paid by said Terminal Company for said right of way and subsequently pooled by said trustee and sold by said committee at the request of said trustee for the benefit of his said trust.

In accordance with the terms of the said conveyance to it by the said Consolidated Company, the said Terminal Company entered into possession of the said property, constructed thereon its railway, power house and car barns, as is hereinbefore stated, and included

the same in the mortgage to secure the issue of \$500,000.00 of its first mortgage bonds, large numbers of which were purchased by the holders of the Consolidated Company's bonds, and others, by the investing public generally.

That the said property conveyed by said deed of the said Consolidated Company to the said Terminal Company was acquired by said Tanners Creek Drawbridge Company, the predecessor in title of the said Consolidated Company for the specific purpose of selling and leasing along its turnpike a right of way for the operation of an electric railroad, and the said property so conveyed and so used and occupied by the said Terminal Company was, and has always been outside of the right of way of the said Consolidated Company, and was and has always been unnecessary to the full use, benefit and enjoyment of the said Consolidated Company in the conduct of its business. In fact, said property was actually acquired subsequent to the making and recording of said deed of trust from the Tanners Creek Drawbridge Company, and the total cost both by purchase and condemnation of all of said right of way was considerably less than one-fourth of the face value of the bonds

112 of the said Terminal Company paid by the said Terminal Company as consideration for the conveyance of said right of way to it.

On or about the 9th day of October, 1903, by reason of the insolvency of the said Terminal Company, receivers were appointed by this honorable court in the above entitled cause, and the said receivers so appointed entered into possession of the said property of the said Terminal Company, and continued to maintain and operate the same, including all of that portion of the property acquired from the said Consolidated Company, from the date of their appointment to the said 8th day of February, 1907, on which said last named date the said property was by decree of this honorable court of February 7th, 1907, transferred and delivered by the said receivers to your petitioner.

In the decree of this honorable court entered as hereinbefore shown, on the 17th day of March, 1906, pursuant to which, said sale was on May 3, 1906, made to petitioner's assignor, this honorable court provides as follows: "All questions as to the distribution of the proceeds of sale, and all questions as to costs and expenses and allowances and fees to counsel, and all other questions not disposed of by this decree, or which may properly rise under the same, or are the proper subject for future directions are reserved.

Petitioner respectfully but most urgently insists that the perfecting of its title (to the said right of way) and the removal of the cloud upon the same, is one of the questions specifically therein reserved for the future determination of the court, and that this is necessarily true is further shown by the confirmation of the report of the special master, R. T. Thorpe, in which, among other things, he reports and recommends to the court as follows:

"The consideration paid by the Bay Shore Terminal Company to the Consolidated Turnpike Company was paid in bonds and in work, as stated in the deed of the last named company, to the Bay Shore

Terminal Company, and was at the time said deed was made, in the opinion of the Special Master, ample consideration for a good, sufficient and perfect title to said right of way and parcel of land, and there is no further obligation on the part of the Bay Shore Terminal Company to the Consolidated Turnpike Company to be performed before the said Consolidated Turnpike Company shall make its deed to the Bay Shore Terminal Company perfect.

The Special Master, therefore, recommends that the receivers of the Bay Shore Terminal Company be required to demand of the Consolidated Turnpike Company such action on its part as will release the said right of way and parcel of land from the encumbrances of the said deeds of trust; and in the event the said Consolidated Turnpike Company shall refuse and fail to do so, the said receivers shall be required to clear the title of the said right of way and parcel of land of all encumbrances, by condemnation proceedings, or otherwise."

On the 6th day of March, 1903, this honorable court, upon consideration of that portion of the report just above quoted, in order more expeditiously to clear the title to said right of way, entered a decree authorizing its receivers to commence proceedings for the condemnation of the said right of way, free and discharged of any lien which might be asserted against the same, and in pursuance of such authorization, the said receivers began negotiations with the said Consolidated Company and with the said trustee, Walter H. Taylor, for the friendly elimination of any question or cloud upon the title to the property, and an agreement having been perfected, mutually satisfactory to the said receivers and the said Consolidated Company and the said Walter H. Taylor, trustee, having, however, first obtained the consent of the holders of the bonds of the said Tanners Creek Drawbridge Company to the said proposed arrangement, as well as the consent of a large majority of the holders of the said Consolidated Company's bonds, counsel of the said company was authorized and directed on behalf of the said Consolidated Company and the said trustee, to carry out and perfect said arrangement so made. But before the same could be carried into effect, the said defendant, Depue, with the intent to harass and impede the court in the orderly administration of the property under its control and to depreciate the value of the said property, when offered for sale, secretly and clandestinely through the said H. L. Page, acquired the title and control of a majority of the stock and bonds of the said Consolidated Company; repudiated the said agreement, and proceeded in every manner possible to harass this honorable court by contesting the condemnation proceedings instituted under its authority, and which by reason of such action, have been without result. The said act of the said Depue being a part and parcel of a general conspiracy entered into between himself, one F. D. Zell and William E. Fritz, the character and purpose of said acts on the part of all of said parties having heretofore in this cause received the severest censures of this honorable court, all of the said persons representing but one undisclosed person or interest, and while ap-

114 parently acting independently, all working to one common end, the confiscation of the property under control of this court by the assertion of claims against the same and clouds upon its title, intended to prevent a sale of the same and to impede the court in delivering to its purchasers a good and perfect title.

Your petitioner is informed, believes and therefore charges, that one of the purposes of the conspiracy aforesaid and the purchase of the said Consolidated Company bonds by the said defendant, Depue, and the subsequent acquisition or control by the said Depue of a majority of the bonds of the said Tanners Creek Drawbridge Company, which this petitioner alleges is with the purpose of foreclosing the said right of way, and by reason of the ownership of said bonds, to acquire the same at a sacrifice price with all of the tracks, equipments and improvements placed thereon by the said Terminal Company, and conveyed for a valuable consideration to this petitioner by decree of this honorable court, and subsequently by application to the council of the City of Norfolk, under the provisions and terms of the franchise granted to the said Terminal Company by said councils, acquire the right to use the tracks and electrical equipment of this petitioner, conveyed by decree of this court, for the operation of cars over its said tracks, in the said City of Norfolk, in conjunction with the operation of the same over said right of way, a result, which, if consummated, would render the property of your petitioner, for which your petitioner has paid into this court, the said sum of \$765,000.00, of practically no value.

In furtherance of this design, and to enable the said defendant, Depue, to carry out the said purpose, the said Consolidated Company, on the 18th day of March, 1907, through its President, H. L. Page, who is and has at all times heretofore been a tool and agent of the said Depue in the attempted accomplishment of his improper designs, confessed judgment in the Circuit Court of Norfolk County for an alleged indebtedness owing to the said Depue by the Consolidated Company, and on the same date was, at the instance of the said Depue, appointed receiver by the said Circuit Court of Norfolk County, of all of the property, rights and franchises of the said Consolidated Company, in a certain Chancery suit instituted by the said Depue against the said Consolidated Company for the avowed purpose of foreclosing said property and depriving your petitioner of its right of way and the equipments and improvements thereon, and your petitioner therefore, charges that the carrying out of said illegal and improper purpose is imminent, and unless said parties are promptly restrained by the order of this court, they will complete the said purpose and deprive this petitioner of the said right of way and of the equipments, etc., upon the same in utter and absolute disregard of the deed delivered to your petitioner

115 by decree of this honorable court by its commissioners of sale. Your petitioner charges that it is entitled to the said right of way and the equipments thereon, etc., and that the said plat of land upon which the power house, car barns, etc., is now located, free and discharged from all liens and claims of any sort whatsoever and particularly from any lien or claim of the said Walter H. Tay-

lor, trustee, or the said holders of the bonds of the said Consolidated Turnpike Company, or the said Tanners Creek Drawbridge Company, and that it is entitled to have the said cloud upon the title to the said property cleared by a decree to be entered in this court.

Your petitioner therefore, shows that it is without remedy save in your honor's court and therefore, prays that the said Consolidated Turnpike Company of Norfolk, Va., the said Walter H. Taylor, trustee, the said Arthur W. Depue and all of the bondholders secured in the two mortgages aforementioned to the said Walter H. Taylor, trustee, namely, one from the Tanners Creek Drawbridge Company, under date of June 1, 1898, and the other from the said Consolidated Turnpike Company of Norfolk, Virginia, under date of April 2, 1900, under the designation of "parties unknown," the said Bay Shore Terminal Company, the Atlantic Trust & Deposit Company, trustee, and the said Chas. E. Finke, be made parties defendant to this petition and be served with the process of this court, requiring them to be and appear in this cause and answer the premises, but without oath, and to stand and abide by such orders and decrees as the court shall enter in this cause.

And further praying, your petitioner asks that:

First: That this honorable court construe the scope, force and effect of its various decrees, directing and authorizing the conveyance to your petitioner of the said property, rights and franchises of the said Terminal Company, particularly that portion of the said property, rights and franchise as we conveyed to the said Terminal Company by the said Consolidated Company by its aforesaid deed of March 1, 1902.

Second: That this honorable court adjudge, order and decree that the consideration heretofore paid by the said Terminal Company to the said Consolidated Company, and delivered to the said Walter H. Taylor, trustee, is a good and valuable consideration for the property, rights and franchises therein conveyed, and that the title to
116 the said property, rights and franchises thereby conveyed is free and discharged from the liens of the said deeds of trust, and is vested absolutely and unconditionally in your petitioner; and that the said Walter H. Taylor, trustee in each of said mortgages aforesaid be required to execute, acknowledge and deliver to your petitioner such deeds of release or other instruments as may be necessary or proper to clear the record title of this petitioner of any lien, or said mortgage, or either of them.

Third: As an alternative relief, in the event that this honorable court should not so hold, that it will forthwith require the delivery and surrender by the said Walter H. Taylor, trustee, or the said Consolidated Company, either or both, of all consideration he or it, or both of them, may have received by virtue of said transfer, or of any substitution of consideration they may have received by reason of the transfer or disposition of the said original valuable consideration.

Fourth: That this honorable court, should it become necessary to perfect the title conveyed by it in and to the aforesaid property, rights and franchises conveyed in the said deed, will take, authorize

and direct such proper legal or equitable proceedings, or both, as may be necessary to perfect the title of your petitioner in and to the said property, rights and franchises.

Fifth: Pending the determination by this honorable court, this being a case of emergency, your petitioner prays that this honorable court may enjoin and restrain the said Arthur W. Depue, the said Consolidated Turnpike Company of Norfolk, Virginia, their respective servants, agents and employees, and all other persons, whether acting independently or by or through the said defendant Depue, or the Consolidated Turnpike Company, from prosecuting or taking any steps looking to the prosecution of the said suit entitled Arthur W. Depue v. Consolidated Turnpike Company, now pending in the Circuit Court of the County of Norfolk, Virginia, or from instituting and prosecuting any other suits which may or might be instituted or prosecuted, so far as the same may affect the property, rights and franchises conveyed to the said Bay Shore Terminal Company by the Consolidated Turnpike Company by its deed aforesaid, and that the said W. H. Taylor, Trustee, be also enjoined from taking any steps or doing anything of any nature whatsoever having a tendency to interfere with petitioner in the possession of said property conveyed by said commission-s of sale, and that your petitioner will be given such further relief, both general and
 117 special, as the nature of its case may require, and to equity may seem meet.

And your petitioner will ever pray.

NORFOLK AND OCEAN VIEW
RAILWAY COMPANY,

By W. J. KEHL,

Secretary and Treasurer.

STATE OF VIRGINIA,

Corporation of the City of Norfolk, To wit:

Personally appeared before me, a notary public for the corporation aforesaid in the State of Virginia, W. J. Kehl, who being duly sworn, deposes and says that he is Secretary and Treasurer of the Norfolk and Ocean View Railway Company, and that the facts stated in the foregoing petition of his own knowledge are true, and so far as stated on the information of others he believes them to be true.

Given under my hand this 4th day of April, 1907.

Notary Public.

N. & O. V. Co. No. 1.

This indenture, made this the 1st day of June, in the year 1898, between Tanners Creek Drawbridge Company, a corporation duly chartered under the laws of the State of Virginia (hereinafter called the company), party of the first part, and Walter H. Taylor, trustee, party of the second part:

Whereas, the stockholders of Tanners Creek Drawbridge Company,

at a general meeting held at the City National Bank of the City of Norfolk, Va., on the 3rd day of May, 1898, adopted the following resolutions:

First: Resolved, that this company issue twenty year six per cent. gold bonds, to the amount of twenty-five thousand dollars (\$25,000.00), five thousand dollars (\$5,000.00) in denominations of one hundred dollars (\$100.00) each, and twenty thousand dollars (\$20,000.00) in denominations of five hundred dollars (\$500.00) each, and secure the said issue of bonds by a first mortgage on all of its property, rights and franchises, the said bonds to be placed in the treasury of the company for sale.

Second: Resolved, that the attorney of the company be, and he is hereby, authorized to prepare a mortgage or deed of trust to
 118 Walter H. Taylor, as trustee, to secure the \$25,000.00 bond issue, as provided by resolution just adopted, and to have bonds printed or lithographed, and when said bonds and mortgage or deed of trust have been prepared, the president and treasurer are hereby authorized to sign the bonds, and the president and secretary to execute the mortgage or deed of trust, and affix the corporate seal of the company thereto. The trustee shall also countersign the bonds, certifying that they are part of the said issue.

And whereas, the attorney for the company under authority of the two resolutions above set forth has procured lithographed bonds bearing date June 1st, 1898, with forty coupons attached to each bond representing semi-annual interest thereon, forty thereof in denomination of \$500.00 each and fifty thereof in denomination of \$100.00 each, and in the following form, to wit:

UNITED STATES OF AMERICA,

State of Virginia, County of Norfolk:

Tanners Creek Drawbridge Company.

First Mortgage Gold Bond.

For value received, Tanners Creek Drawbridge Company, a corporation duly chartered and organized under the laws of the State of Virginia, promises to the bearer hereof the principal sum of \$500.00 on the first day of June, 1918, with interest thereon, payable semi-annually, at the rate of six per cent. per annum, from the first day of June, 1898, until the said principal sum shall be paid in full, said principal and interest are payable in gold coin of the United States, at the time they become due at the City National Bank of Norfolk, Va., in the City of Norfolk, Va. The interest on this bond until the principal becomes due is represented by forty coupons of \$15.00 each, payable semi-annually, on the 1st day of December and the 1st day of June in each year on presentation of the properly matured coupon at the City National Bank of Norfolk, Va. This bond is one of a series of ninety bonds of the same tenor and date, amounting in the aggregate to \$25,000.00, fifty of which are for \$100.00 each, numbered from one to fifty, and forty are for \$500.00 each, numbered from fifty-one to ninety, issued by Tanners Creek

Drawbridge Company, and secured by a deed of trust dated the first day of June, 1898, to Walter H. Taylor, trustee, and duly
 119 recorded in the clerk's office of the County Court of Norfolk County, Virginia.

In witness whereof the said Tanners Creek Drawbridge Company has caused this bond to be signed by its president and treasurer, and the signature of the said treasurer to be lithographed on the forty coupons attached, and has hereto affixed its corporate seal at the County of Norfolk, Virginia, this 1st day of June, 1898.

 President.

 Treasurer.

Form of \$100.00 Bond.

UNITED STATES OF AMERICA,

State of Virginia, County of Norfolk:

Tanners Creek Drawbridge Company.

First Mortgage Gold Bond.

For value received, Tanners Creek Drawbridge Company, a corporation duly chartered and organized under the laws of the State of Virginia, promises to pay to the bearer hereof the principal sum of \$100.00 on the first day of June, 1918, with interest thereon, payable semi-annually, at the rate of six per cent. per annum from the first day of June, 1898, until the said principal sum shall be paid in full, said principal and interest are payable in gold coin of the United States, at the time they become due at City National Bank of Norfolk, Va., — in the City of Norfolk, Va. The interest on this bond until the principal becomes due and payable is represented by forty coupons of \$3.00 each, payable semi-annually on the first day of December and the first day of June in each year on presentation of the properly matured coupon at City National Bank of Norfolk, Va. This bond is one of a series of ninety bonds of the same tenor and date, amounting in the aggregate to \$25,000.00, fifty of which are for \$100.00 each, numbered from one to fifty, and forty for \$500.00 each, numbered from fifty-one to ninety, issued by Tanners Creek Drawbridge Company, and secured by deed of trust, dated the first day of June, 1898, to Walter H. Taylor, trustee, and duly recorded in the clerk's office of the County Court of Norfolk County, Virginia.

120 In witness whereof the said Tanners Creek Drawbridge Company has caused this bond to be signed by its president and treasurer, and the signature of the said treasurer to be lithographed on the forty coupons attached, and has hereto affixed its corporate seal at the County of Norfolk, Virginia, this first day of June, 1898.

 President.

 Treasurer.

And whereas the attorney was further instructed to prepare a mortgage or deed of trust to secure said bonds, which was to be executed by the president and secretary of the company.

Now, This Indenture Witnesseth, that for and in consideration of the premises and of the sum of one dollar in cash to it by the said trustee paid at and before the ensembling and delivery hereof, the receipt whereof is hereby acknowledged, and in order to secure equally and without distinction or priority one over another the payment of the above mentioned bonds, made and issued for the purpose and in the manner and for the amounts aforesaid, and the coupons for interest to accrue thereon, the said company hath granted, bargained, sold, aliened, enfeoffed, conveyed, released, confirmed, assigned, transferred and set over, and by these presents in pursuance and in execution of the power and authority of the said company in it vested by the laws of the State of Virginia, and by the resolution hereinbefore recited, and of all and every other power and authority in said company in any wise vested, doth grant, bargain, sell, alien, enfeoff, convey, release, confirm, assign, transfer and set over unto the said trustee, and his successors and assigns, the following property, rights and franchises, to-wit:

All and singular the lands, buildings, bridges, roadway, property rights and easements, and all articles of personal property of every kind and description to the said company belonging or in anywise appertaining, used in the operation of its toll road and bridges, from a point at or near the gate of Norfolk City Park to a point at or near Ocean View, in the County of Norfolk, in the State of Virginia, and also all corporate rights, powers and franchises to the said company belonging or in anywise appertaining, with which it was invested by the Legislature of the State of Virginia, or in any other manner, in conformity with the laws of said State, and all property of every kind and description hereafter acquired by said company.

To have and to hold upon the following uses and trusts and none other, to-wit: for the equal pro rata use, benefit and security
 121 of the several persons, partnerships and bodies corporate, their respective executors, administrators, successors and assigns, who shall be or become holders of said bonds or interest coupons, without any preference, priority or distinction as to lien or otherwise whatever, notwithstanding any difference there may be in time of issue or negotiations, provided, however, that none of the bonds so issued by the said company shall be obligatory as against the maker or deemed to be secured by this deed unless the said bond or bonds be countersigned by the said trustee, as provided by the foregoing resolutions, but when so countersigned it shall be conclusive evidence that the bond has been duly issued thereunder, and is entitled to participate in the trust hereby created. That until default be made for a period of sixty days in the payment of the principal and interest on the said bonds or breach for a like period in the performance of any covenant herein contained, and on the part of the said company to be observed, kept and performed, the company shall be suffered and permitted to possess,

manage, operate and enjoy the estate, premises, corporate rights and franchises, and the appurtenances thereto belonging, and to take and use the income, rents, issues and profits thereof in the same manner, and with the same effect as if this indenture had not been made, and the said company shall also have full power from time to time to dispose of in its discretion such portion of its material, bridges, equipment, machinery and implements at any time held or acquired for the use of said company as may have become unnecessary or unfit for such use, replacing the same where necessary by new, which shall then become subject to the lien of this conveyance without any further act from the said company, but which if required by the said trustee shall be expressly conveyed to said trustee subject to such lien, and all provisions herein contained relating to the present trust shall extend to and include any successor or successors in this trust; and upon such default of payment or breach of covenant, the said trustee shall forthwith notify the said company in writing to comply with the terms of this indenture by making such payment or performing such covenant within thirty days from the date of said notice, and if the said company shall refuse, neglect or omit from any cause within thirty days succeeding said notice to comply with the demands thereof, or in either such event, all the bonds issued by the said company referred to and secured by this indenture principal and interest, shall be taken and considered to have fallen and become due and payable at the date of the said notice from the trustee and it shall be the duty of the said trustee to proceed forthwith and without

122 further notice or demand from said bondholders, or any of them, upon being furnished with adequate security and indemnity against all costs, expenses and liabilities which he may incur in the premises, to institute the proper proceedings at law or in equity, or otherwise, as herein permitted for the protection and enforcement of the rights and remedies of the holders of said bonds, anything herein contained or any law, rule or custom of the State of Virginia to the contrary notwithstanding; that is to say first the said trustee may and he is hereby authorized and empowered, to sell all the property, rights and franchises hereby encumbered, or agreed and intended so to be, with the appurtenances, to the highest and best bidder at public auction in the City of Norfolk, Virginia, after first giving thirty days' notice of the time, place and terms of sale by publication made at least twice a week in one daily paper published in the said City of Norfolk, and the said property may be sold as an entirety or in parcels as may be deemed best by said trustee, and the said trustee is hereby authorized and empowered to grant and convey the said estate, premises, corporate rights and franchises to the purchaser or purchasers free from all and every the trusts hereby created and such purchaser or purchasers shall not after paying the same to said trustee be any further responsible for the application of the purchase money, and the purchase money after paying the costs and expenses attending the execution of this trust, and all counsel fees and other expenses incurred in reference to the same including a reasonable allowance

to said trustee for his services, shall be applied to the payment of the interest due upon said bonds at the time of the said notice, and upon the principal of said outstanding bonds in full if said purchase money be sufficient, and if not then pro rata, and if there be left in the hands of the trustee any portion of the trust estate, of the proceeds thereof, after the payment in full of the principal and interest of the aforesaid bonds, then the said trustee shall reconvey and pay over the same to the said company, its successors or assigns, for its sole use and benefit upon lawful demand being made. Or second the said trustee may, and he is hereby authorized and empowered, to institute proceedings at law or in equity for the foreclosure of the deed hereby created and to cause the said estate, premises, corporate rights and franchises hereby encumbered, or agreed or intended so to be with the appurtenances to be sold by judicial process, without any further stay, and the proceeds or purchase money of such sale shall be appropriated and paid as is above provided in case of sale by the trustee and pending any such proceeding he shall be entitled to a receivership of the said property rights, and franchises and the earnings and incomes thereof. Or

123 third the said trustee may, and he is hereby authorized and empowered to enter upon and take possession of all and singular the properties, rights and franchises with their appurtenances and operate, use, manage and control the same to the best advantage, to collect and receive all incomes, rents, issues and profits of the same, to insure and keep insured at the expense of the trust estate the buildings, bridges, structures and equipments, and to make all necessary and proper repairs, renewals and alterations, and after deducting his expenses and a reasonable compensation to himself and his agents the said trustee shall appropriate the net incomes and proceeds derived therefrom towards the payment of the interest in the order in which it shall have fallen due until all of said interest shall have been fully paid. And the above methods which may be adopted by the said trustee for the protection and enforcement of the rights and remedies of the holders of the bonds are hereby made cumulative and concurrent, and the said trustee is hereby authorized in his discretion to pursue the same singly and successively or concurrently and jointly. It is hereby covenanted between the said company and the holders of the bonds secured by this indenture that if at any time the said bonds shall become due and payable by reason of the failure of the said company to keep and observe any of the covenants of this indenture or by lapse of time no suit, judgment or other proceedings, either at law or in equity, shall be instituted or prosecuted by the holders of said bonds or coupons or by any of them, against any estate premises, corporate rights and franchises hereby encumbered, or agreed and intended so to be, with the appurtenances, except by and through the said trustee as provided herein, it being understood that the holders of said bonds or of said coupons shall not have any method for the enforcement of payment of the principal and interest thereof except as herein provided, and that all proceedings at law or in equity shall be instituted and maintained by the

said trustee for the equal use and benefit of all the holders of said bonds and coupons. And the said company doth hereby covenant that should it purchase or acquire in any manner any real estate or personal property during the term of this indenture, it will upon requests made to it by the trustee herein, or his successors, convey said real estate or personal property to said trustee or his successor in order that the same may become by additional express conveyance subject to the terms of this indenture. And the said company further covenants that it will at any time make; do, execute, acknowledge and deliver all such other and further acts, deeds and assurances of the property herein conveyed or agreed and intended

124 so to be as shall be reasonable and advised by counsel, for the better, assuring and confirming the same to the said trustee, and his successors in the trust hereby created. And the said company doth hereby covenant to keep the buildings, bridges and roads in good and reasonable repair as contemplated by the statutes of Virginia in such cases made and provided for the regulation and governance of turnpike companies, and keep the buildings and bridges insured while the same shall remain in its possession and under its control, and it shall and will from time to time pay and discharge all taxes, dues, levies and assessments which may be lawfully charged against all the said property while the same remains in its possession as aforesaid, and that the said company shall and will punctually pay the interest on said bonds semi-annually as the same shall fall due and payable according to the terms and conditions of said bonds and of this indenture, and shall and will on the first day of June, in the year 1918, fully and entirely pay off and satisfy the whole of said bonds issued and secured under and by this mortgage, principal and interest, without any further delay and without deduction from either the said principal or interest for any tax or taxes which may be imposed thereon, or which the said company may be required to pay or retain therefrom by law. And the said company doth hereby waive the benefit of all stay, exemption, valuation and appraisement laws now existing or which may be passed by the United States or any State thereof, and of all other laws now existing or which may be hereafter passed, which may in any way prevent or impede the said trustee, his successors or assigns, in any manner in the execution of this trust.

It is hereby mutually covenanted and agreed and made an express condition upon which this trust is accepted that the said trustee shall not incur any liability whatever in consequence of permitting or suffering the said company to retain possession of the property and estate hereby conveyed as hereinbefore provided, and shall be liable only for wilful and intentional breaches of the trust hereby created and imposed in him, and the said trustee shall not be under any obligation to take any action in executing this trust which in his opinion will be likely to involve him in expense or liability unless the said company, or any or more of the bondholders, or some one for them, shall give him reasonable indemnity against such expense or liability, and the said trustee may resign and discharge himself of the trust hereby created by giving three months'

notice in writing of his intention so to do to the company, or such shorter notice as the said company may accept as adequate, and *and* that said trustee may be removed at any time by written order or notice duly signed by the holders of a majority in interest

125 of the bonds issued hereunder then outstanding on payment of the reasonable charges of said trustee for the services and expenses of himself, his attorneys and agents to the date of service of said order and notice, in creating and discharging the trust hereby declared. And when ever a vacancy shall occur in the office of trustee hereunder, by resignation or otherwise, the board of directors of said company shall have the right to appoint a successor or successors to fill such vacancy, which appointment shall be attested by the certificate in writing of the president and secretary of the said company, under its corporate seal and shall be duly acknowledged and recorded in the clerk's office of the County Court of Norfolk County, in the State of Virginia, and notice of such appointment shall be given by publication once a week for four successive weeks in at least one newspaper published in the City of Norfolk, Virginia, and the successor or successors appointed as aforesaid shall continue to be the trustee or trustees, hereunder until a majority in interest of the holders of the bonds hereby secured and then outstanding shall upon the satisfaction of the reasonable claim for the trustee for the expenses incurred instruments in writing executed under their hands and concurrent instruments in writing executed under their hands and seals, or the hands and seals of their attorneys in fact for that purpose, appoint a new trustee or trustees to act hereunder, in which event upon the filing of such instrument or instruments in said clerk's office of the Norfolk County Court, the trustee or trustees thereby appointed shall without any further act or deed become the trustee or trustees hereunder and if said Board of Directors shall for thirty days neglect or refuse to fill any such vacancy, or if the majority in interest of the bondholders shall not be satisfied with the trustee or trustees so appointed, the same may be filled by the majority in interest of the bondholders by making and filing for record the instrument or instruments of appointment as aforesaid, and when appointment shall be made by the majority in interest of the holders of outstanding bonds as aforesaid it shall supersede any appointment made otherwise. And it is mutually covenanted that any instrument in writing required or authorized by any of the provisions of this indenture to be executed by holders of the bonds hereby secured, or any of them, may be in any number of parts, and the execution thereof and the dates of holding and ownership shall be deemed sufficiently proved for the purposes of this indenture if a notary public or other officer authorized by the laws of any State where the paper is executed to take acknowledgments of deeds shall under his official seal certify

126 that each of the several parties signing the same has upon the date therein certified duly acknowledged before him the execution thereof and exhibited to him the execution thereof and exhibited to him as the property of such subscriber, or if he signs as attorney in fact or his principal, bonds of the description of those

hereby secured, of the amounts and bearing the serial numbers there in stated, and in like manner the execution of each power of attorney under which any person shall claim to act for another in signing such instrument shall be sufficiently proved if acknowledged before and certified by any such officer under his official seal. In the event of a sale by the said *by the said* trustee of the property, rights and franchises hereby conveyed, or any part thereof, as hereinbefore provided, the purchaser or purchasers shall in making settlement therefor be entitled to use the bonds held by such purchaser or purchasers towards the payment whereof the net proceeds of said sale shall be legally applicable, reckoning said bonds so used at such sum as shall be payable out of the net proceeds on account thereof, and if the net proceeds applicable to said bonds shall be sufficient to pay them in full, the person or persons making said sale and entitled to receive the purchase money shall receive the bonds and cancel the same, but if the net proceeds applicable to such payment shall not be sufficient to pay the bonds in full due endorsement shall be made as a credit of the amounts realized on account thereof. But if no default in payment or breach of covenant is made by the said company and the said company, its successors, lessees or assigns, shall pay or cause to be paid, unto the holders of the bonds intended to be secured hereby, the several and respective sums represented thereunder, on the day and time set for the payment thereof, together with the interest thereon, according to the provisions and stipulations of said bonds and of this indenture, and shall well and truly keep and perform all the stipulations, covenants and agreements herein required to be kept and performed by it according to the true intent and meaning hereof, then and from thenceforth, as well the said bonds as this indenture and the estate hereby granted, shall cease determine and become void, and the said trustee, for himself, and his successor or successors in trust, hereby covenant that satisfaction shall be promptly entered of this incumbrance, and that he will execute and deliver to said company, its successor or assigns, a full and proper release of the property and estate hereby conveyed.

In witness whereof the said company, has caused these presents to be executed by its president and secretary and its corporate seal to be hereto affixed and attested by its secretary, and the said trustee has hereto set his hand and affixed his seal.

TANNER'S CREEK DRAWBRIDGE COMPANY,

By H. L. PAGE, *Its President*;

Teste: B. W. LEIGH, *Its Secretary*.

WALTER H. TAYLOR, *Trustee*.

N. & O. V. R. Co. No. 2.

This deed made the 2nd day of April, in the year 1900, between the Consolidated Turnpike Company of Norfolk, Virginia, a corporation duly chartered by the General Assembly of the Commonwealth of Virginia, party of the first part, and Colonel Walter H Taylor, of the City of Norfolk, Virginia, party of the second part:

Whereas, at a meeting of the stockholders of the said Consolidated Turnpike Company of Norfolk, Virginia, held in said City of Norfolk, on the 20th day of July, 1900, the following resolution, among others, was adopted: "That the president and treasurer of the said Consolidated Turnpike Company of Norfolk, Virginia, be, and they are hereby authorized, empowered and directed to make and execute bonds of the said Consolidated Turnpike Company of Norfolk, Virginia, to the amount of two hundred thousand dollars in denominations as follows: Three hundred and eighty of said bonds each in the denomination of five hundred dollars, and one hundred of said bonds each in the denomination of one hundred dollars; that the said bonds shall be dated April 2nd, 1900, and shall be made payable to bearer in gold at the Marine Bank of Norfolk, Virginia, on the 1st day of April, 1950, and each of said bonds shall have coupons attached thereto, bearing the lithographed signature of the treasurer of the Consolidated Turnpike Company of Norfolk, Virginia, for the payment in gold at the said Marine Bank of Norfolk, Virginia, of the semi-annual interest thereon on the first day of October and April of each year until the maturity of the said bonds, and that all of the said bonds shall be identified by the signature of the trustee hereinafter named, as to the genuineness by a certificate on each bond to the effect that it is one of the bonds hereby authorized and secured by the deed of trust hereinafter mentioned; and that the president of the said Consolidated Turnpike Company of Norfolk, Virginia, be, and he is hereby authorized, empowered and directed to make and execute a deed of general warranty also dated April 2nd, 1900, with the seal of the said company hereto affixed by the
128 secretary, conveying to Colonel Walter H. Taylor, who is hereby chosen as trustee for that purpose, of the property, rights and franchises now owned or which may hereafter be acquired by the said Consolidated Turnpike Company of Norfolk, Virginia, for the purpose — securing equally and without preference the holder or holders of the said bonds and the payment of the semi-annual interest thereon, with the right and power in the said trustee to make sale of all the property, works, rights and franchises upon default in the payment of the said bonds when the same may mature, and also in default for sixty days in the payment of the semi-annual interest on said bonds, or of any one or more of them, upon request of the holder or holders of one-tenth of the said bonds, upon such terms as are usual in such deeds, and also providing for having another trustee appointed to execute the said deed in case of the death or resignation of the said Walter H. Taylor or his inability from any legal cause to act as trustee, which covenants however shall be subject to the several liens or claims on the said property, works, rights and franchises, subject to which the several conveyances hereinafter mentioned to the said Consolidated Turnpike Company, of Norfolk, Virginia, were made as follows:

The floating indebtedness of \$3,000.00 mentioned in the deed from the Norfolk and Princess Anne Turnpike Company a lien to secure \$25,000.00 of bonds and floating indebtedness of \$1,000.00 mentioned in the deed from the Tanner's Creek Drawbridge Company,

a floating indebtedness of \$3,000 mentioned in the deed from the Eastern Branch Turnpike Company; a lien to secure \$15,000.00 of bonds and floating indebtedness of \$500.00 mentioned in the deed from the Indian River Turnpike and Toll Bridge Company; the whole aggregating \$47,500.00, for which bonds issued under this resolution aggregating the said sum of \$47,500.00 are to be held by the said Consolidated Turnpike Company of Norfolk, Virginia, the purpose of meeting and liquidating said liens and indebtedness."

And whereas, the said bonds aggregating the sum of \$200,000.00 have been made and executed by the president and treasurer of the said Consolidated Turnpike Company of Norfolk, Virginia, with the coupons thereto attached bearing the lithographed signature of the said treasurer, 380 of the said bonds each in the denomination of \$500.00 and numbered, respectively, from one to three hundred and eighty, inclusive, and 100 of said bonds each in the denomination of \$100.00, and numbered, respectively, from three hundred and eighty-one to four hundred and eighty, inclusive, all of the said bonds being identified by the signature of the said trustee as to their genuineness by a certificate on each of said bonds, the said bonds, coupons and certificates being each in general form and substance, except the numbering and the dates on which the said coupons, respectively, are payable, in the following words and figures, to-wit:

UNITED STATES OF AMERICA,
State of Virginia, City of Norfolk:

No. —.

\$500.00.

First Mortgage Gold Bond.

\$500.00.

Consolidated Turnpike Company of Norfolk, Virginia.

For value received, the Consolidated Turnpike Company of Norfolk, Virginia, a corporation duly chartered and organized under the laws of the State of Virginia, promises to pay to the bearer hereof the principal sum of five hundred dollars on the first day of April, 1950, with interest thereon, payable semi-annually, at the rate of five per centum per annum from the first day of April, 1900, until said principal sum shall be paid in full, said principal and interest are payable in gold coin of the United States at the time they become due at the Marine Bank of Norfolk, Virginia, in the City of Norfolk, Virginia. The interest on this bond until the principal becomes due is represented by one hundred coupons of twelve and 50/100 dollars, payable semi-annually, on the first day of April and the first day of October in each year, on presentation of the properly matured coupon at The Marine Bank of Norfolk, Virginia. This bond is one of a series of 480 bonds, 380 of which are for \$500.00 each, numbered from one to three hundred and eighty, and 100 of \$100.00 each, numbered from three hundred and eighty-one to four hundred and eighty, both inclusive, amounting to the aggregate to \$200,000.00,

issued by the Consolidated Turnpike Company of Norfolk, Virginia, and secured by deed of trust, dated the 2nd day of April, 1900, to Walter A. Taylor, trustee, and duly recorded in the clerk's office of the County Courts of Norfolk and Princess Anne Counties, Virginia.

In witness whereof, the Consolidated Turnpike Company of Norfolk, Virginia, has caused this bond to be signed by its president and treasurer, and the signature of the said treasurer to be lithographed on each of the one hundred coupons attached, and has hereby affixed its corporate seal at the City of Norfolk, Virginia, this 2nd day of April, 1900.

130 The revenue tax upon this bond has been duly paid by affixing stamps to the mortgage as provided by law.

H. C. WHITEHEAD,
Treasurer.

H. L. PAGE,
President.

Form of Coupon Attached to Each \$500.00 Bond.

STATE OF VIRGINIA,
City of Norfolk:

\$12.50.

Consolidated Turnpike Company of Norfolk, Virginia, will pay to bearer at The Marine Bank of Norfolk, Virginia, \$12.50/100 in gold coin of the United States, on the first day of —, 19—, for six months' interest then due on this bond, No. —, for \$500.00.

H. C. WHITEHEAD, *Treasurer.*

Form of \$100.00 Bond.

UNITED STATES OF AMERICA,
State of Virginia, City of Norfolk:

No. —.

\$500.00.

\$500.00.

First Mortgage Gold Bond.

Consolidated Turnpike Company of Norfolk, Virginia.

For value received, the Consolidated Turnpike Company of Norfolk, Virginia, a corporation duly chartered and organized under the laws of the State of Virginia, promises to pay to the bearer hereof the principal sum of one hundred dollars on the first day of April, 1900, with interest thereon, payable semi-annually, at the rate of five per centum per annum from the first day of April, 1900, until said principal sum shall be paid in full, said principal and interest are payable in gold coin of the United States at the time they become due at The Marine Bank of Norfolk, Va., in the City of Norfolk. Va. The interest on this bond until the principal becomes due is represented by one hundred coupons of two and 50/100 dollars each, payable semi-annually on the first day of April and the first day of October in each year on presentation of the properly matured coupons

at the Marine Bank of the City of Norfolk, Virginia. This bond is one of a series of 480 bonds, 380 of which are for \$500.00 each, numbered from one to three hundred and eighty, and 100 of \$100.00 each, numbered from three hundred and eighty-one to four hundred and eighty, both inclusive, amounting in the aggregate to \$200,000.00, issued by the Consolidated Turnpike Company of Norfolk, Virginia, and secured by deed of trust, dated the 2nd day of April, 1900, to Walter H. Taylor, trustee, and duly recorded in the clerk's office of the County Courts of Norfolk and Princess Anne Counties, Virginia.

In witness whereof, the Consolidated Turnpike Company of Norfolk, Virginia, has caused this bond to be signed by its president and treasurer, and the signature of the said treasurer to be lithographed on each of the one hundred coupons attached, and has hereto affixed its corporate seal at the City of Norfolk, Virginia, this 2nd day of April, 1900.

The revenue tax upon this bond has been duly paid by affixing stamps to the mortgage as provided by law.

H. C. WHITEHEAD,

Secretary.

H. L. PAGE,

President.

Form of Coupon Attached to Each \$100.00 Bond.

STATE OF VIRGINIA,

City of Norfolk:

\$2.50

Consolidated Turnpike Company of Norfolk, Virginia, will pay to the bearer at the Marine Bank of Norfolk, Virginia, \$2.50/100 in gold coin of the United States, on the first day of —, 19—, for six months' interest then due on this bond, No. —, for \$100.00.

H. C. WHITEHEAD, *Treasurer.*

Form of Trustee's Certificate.

I certify that this is one of the series of 480 bonds, aggregating \$200,000.00, issued by the Consolidated Turnpike Company of Norfolk, Virginia, and secured by deed of trust to me, dated the 2nd day of April, 1900 and duly recorded in the clerk's office of the County Court of Norfolk and Princess Anne Counties.

WALTER H. TAYLOR, *Trustee.*

And whereas, at the said meeting of stockholders of the said Consolidated Turnpike Company of Norfolk, Virginia, held on the said 20th day of July, 1900, it was further resolved, "that the deed of trust and bonds with coupons drawn in accordance with the first of the above resolutions, which have been submitted by the president and attorney of the Consolidated Turnpike Company of Norfolk, Virginia, and which have been examined, be adopted and approved, and that the said deed, when executed, be duly recorded in the Counties of Norfolk and Princess Anne."

Now, Therefore, This Deed Witnesseth, that for and in consideration of the premises and of the sum of ten dollars, the receipt whereof is hereby acknowledged, the said Consolidated Turnpike Company, of Norfolk, Virginia, doth grant, bargain, sell, assign, transfer and set over, and by these presents, doth grant, bargain, sell, assign, transfer and set over to the said Walter H. Taylor, all and singular the property and works of the said Consolidated Turnpike Company of Norfolk, Virginia, consisting of its several turnpikes, toll roads and toll bridges in each or both of the Counties of Norfolk and Princess Anne, in the State of Virginia, which were conveyed to it, the said Consolidated Turnpike Company of Norfolk, Virginia, by the Norfolk and Princess Anne Turnpike Company; by the Tanners Creek Drawbridge Company; by the Eastern Branch Turnpike and Toll Bridge Company, and by the Indian River Turnpike and Toll Bridge Company, by the four several deeds of even date with this deed, in which deeds the said property and works is generally described as all and singular the lands, buildings, bridges, roadways, property rights and easements in and to the roads and bridges operated by the said Norfolk and Princess Anne Turnpike Company from points at or near the City of Norfolk, in the County of Norfolk and State of Virginia, to Kempsville, to Grook's Store, and to Little Creek, in the County of Princess Anne, Virginia; and the rights and franchises operated by the Tanners Creek Drawbridge Company from a point near the gate of the Norfolk City Park, to a point at or near Ocean View, in the County of Norfolk; the rights and franchises operated by the Eastern Branch Turnpike and Toll Bridge Company from the City of Norfolk to certain points in the County of Norfolk, as authorized by its charter granted by the Legislature of Virginia, by an act approved March 14th, 1872, and as amended by an act approved March 20th, 1877, and the rights and franchises operated by the Indian River Turnpike and Toll Bridge Company, which said toll road runs partly in the County of Norfolk and partly in the County of Princess Anne, in the said State of Virginia, having its beginning in the said County of Norfolk, at the intersection of the Hodges Road with the road of the Eastern Branch Turnpike and Toll Bridge Company, and running in a general easterly direction in the Counties of Norfolk and Princess Anne until it strikes

133 the Great Bridge Road which it intersects at Dozier corner in the County of Princess Anne. Also such works and property as may in any way hereafter be acquired by the said Consolidated Turnpike Company of Norfolk, Virginia; also the personal property of every kind and description, exclusive of monies, which was conveyed to the said Consolidated Turnpike Company of Norfolk, Virginia, by the four several deeds aforesaid, and which is used in the operation of the said rights and franchises; also all such personal property as may in any way hereafter be acquired by the said Consolidated Turnpike Company of Norfolk, Virginia, acquired under its charter aforesaid or under any and all the deeds aforesaid from the said Norfolk and Princess Anne Turnpike Company, the said Tanners Creek Drawbridge Company, the said Eastern Branch Turnpike and Toll Bridge Company, and the said Indian River

Turnpike and Toll Bridge Company, or which in any way whatever may hereafter be acquired by the said Consolidated Turnpike Company of Norfolk, Virginia, and also sixty-four shares of the capital stock of the Cottage Toll Bridge Company now held by it, the said Consolidated Turnpike Company of Norfolk, Virginia, and any and all other shares of the capital stock of the said Cottage Toll Bridge Company which may hereafter be acquired by the said Consolidated Turnpike Company of Norfolk, Virginia, it being the full purpose and intention of this deed to convey all property, works and franchises now owned, held or enjoyed by the said Consolidated Turnpike Company of Norfolk, Virginia, in the use and operation of its said turnpike, toll roads and bridges, or which may in any way hereafter be acquired by the said Consolidated Turnpike Company of Norfolk, Virginia, as fully and particularly as if the same were here specifically mentioned and described, all subject, however, to the bonding and floating indebtedness hereinbefore mentioned, amounting to \$47,500.00, subject to parts of which the several deeds to the said Consolidated Turnpike Company of Norfolk, Virginia, hereinbefore mentioned were made:

To have and to hold, upon the following uses and trusts and none other, to-wit: For the equal pro rata use, benefit and security of the several persons, partnerships and bodies corporate, their respective executors, administrators, successors and assigns, who shall be or become the holders of said bonds or interest coupons, without any preference, priority or distinction as to lien or otherwise whatever, notwithstanding any difference there may be in time of issue or negotiation. Provided, however, that none of the bonds so issued by the said Consolidated Turnpike Company of Norfolk, Virginia, shall be obligatory as against the maker or deemed to be

134 secured by this deed unless the said bond or bonds be certified by the said trustee as provided in the foregoing resolution, but when so certified by the said trustee it shall be conclusive evidence that said bond or bonds have been duly issued and are entitled to participate in the payment of the principal or of the semi-annual interest on the said bonds when the same shall fall due, or the breach of any covenant herein contained on the part of the said Consolidated Turnpike Company of Norfolk, Virginia, to be observed, kept and performed, the said Consolidated Turnpike Company of Norfolk, Virginia, shall be suffered and permitted to possess, manage, operate and enjoy the estate, premises, corporate rights and franchises, and the appurtenances thereto belonging, and to take and use the incomes, rents, issues and profits thereof in the same manner and with the same effect as if this deed had not been made and the said Consolidated Turnpike Company of Norfolk, Virginia, shall also have full power from time to time to dispose of, in its discretion, such portion of its material, bridges, equipment, machinery, stock and implements at any time held or acquired for the use of said company as may have become unnecessary or unfit for such use, replacing the same where necessary by new, which shall then become subject to the lien of this deed without any further act from the said company, but which if required by the trustee, shall be ex-

pressly conveyed to said trustee as subject to this deed, and all provisions herein contained relating to the present trustee shall extend to and include any successor or successors in this trust, and that upon the breach of any covenant herein contained on the part of the said Consolidated Turnpike Company to be observed, kept or performed, the said trustee at the request of the holder or holders of one-tenth in value of the bonds hereby secured shall forthwith notify the said Consolidated Turnpike Company of Norfolk, Virginia, in writing to comply with the said covenant the breach of which is charged, within thirty days from the date of said notice, and upon the refusal or neglect of the said Consolidated Turnpike Company of Norfolk, Virginia, to comply with the demands of the said notice, or upon default in the payment of the principal of the said bonds hereby secured when due or in default for sixty days in the payment of the semi-annual interest when due the said trustee shall upon the request in writing of the holder or holders of one-tenth in value of the said bonds hereby secured, and upon receiving such security and indemnity for and against the costs as he may require, shall at once (be) authorized and empowered to take possession and charge

135 of all the property works, rights and franchises hereby conveyed or intended to be conveyed and make sale of the same as an entirety or in parcels as to the said trustee shall seem best, to the highest bidder at public auction in the said City of Norfolk, after having given at least thirty days' notice of the time, place and terms of sale by publication in one or more newspapers, published in said city upon such terms as to the said trustee shall seem just and proper for the interest of all concerned and upon a sale thereof to grant and convey the said property works, rights and franchises to the purchaser or purchasers thereof, freed from every and all the trusts hereby created, and such purchaser or purchasers after paying to the said trustee the purchase money shall not be responsible any further for the application of the said purchase money, and the said purchase money, after paying the costs and expenses attending the execution of this trust and all counsel fees and other expenses incurred by the said trustee in reference to the same, including a reasonable allowance to the said trustee for his services, shall be applied to the payment of the principal and interest due upon the said bonds in full if the purchase money shall be sufficient for that purpose, if not then to the payment of the interest then due, and then to the principal of said bonds pro rata, it being understood that in case of any sale under this deed the principal of the said bonds shall be taken and considered as due and payable, although the time for the payment of the said bonds according to their terms shall not then have expired and if there be any portion of the trust estate, or of the proceeds thereof, in the hands of the said trustee after the payment of the said bonds in full principal and interest, then the said trustee shall reconvey or pay over the same to the said Consolidated Turnpike Company of Norfolk, Virginia, its successors and assigns, and that upon any default in the payment of principal and interest, or breach of covenant as aforesaid, the said trustee may, and he is

hereby authorized and empowered, in addition to and concurrent with or independent of the authority and power of sale hereinbefore given to and conferred upon him, to institute proceedings at law or in equity for the foreclosure of the trusts hereby created, and to cause the said property, works, rights and franchises hereby conveyed or intended to be conveyed, to be sold by judicial process, without any further stay, and the proceeds or purchase money of such sale shall be appropriated and paid as is hereinbefore above provided in the case of a sale by the said trustee, and pending the said proceedings the said trustee shall be entitled to the receivership of the said property, works, rights and franchises and to the earnings and incomes thereof. And the said Consolidated Turnpike Company of Norfolk, Virginia, doth hereby covenant that should it during the terms of this trust purchase or in any manner acquired 136 any real estate or personal property, or any other rights and franchises, it, the said Consolidated Turnpike Company of Norfolk, Virginia, will upon the request of the said trustee herein, or his successors, convey any and all such real estate, personal property, rights and franchises to the said trustee, or his successors, in order that the same may become by additional express conveyance subject to the lien created by this deed, and further that it, the said Consolidated Turnpike Company of Norfolk, Virginia, will, at any time hereafter make, do execute and deliver all such other, and proper acts, deeds and assurances of the property, works, rights and franchises hereby conveyed, or intended to be conveyed, as shall be reasonable and advised by counsel learned in the law, for the better assuring and confirming the same to the said trustee and his successors for the purposes of the trust hereby created. And the said Consolidated Turnpike Company of Norfolk, Virginia, doth hereby further covenant that during the continuance of this trust, it the said Consolidated Turnpike Company of Norfolk, Virginia, shall and will keep its turnpikes, toll roads and bridges in good and reasonable repair and condition as contemplated by the statutes of Virginia, in that case made and provided; shall and will keep its buildings and bridges insured; shall and will from time to time pay and discharge all taxes, dues, levies and assessments which may be legally due against all the said property, works, rights and franchises hereby conveyed, or intended to be conveyed, while the same remain in the possession of it, the said Consolidated Turnpike Company of Norfolk, Virginia, and shall and will punctually pay the semi-annual interest on the bonds hereby secured as the same fall due, and the principal of said bonds when the same shall fall due. And the said Consolidated Turnpike Company of Norfolk, Virginia, doth hereby waive the benefit and advantage of all stay, exemption, valuation and appraisement laws now existing or which may be passed by the United States or the said State of Virginia, and all other laws now existing, or which may be hereinafter passed which may in any way prevent or impede the said trustee, his successors or assigns, in any manner in the execution of this trust. It is hereby mutually covenanted, agreed and made an express condition upon which this trust is accepted that the said trustee shall

not incur any liability whatever in consequence of permitting or suffering the said Consolidated Turnpike Company of Norfolk, Virginia, to retain possession of the property, works, rights and franchises hereby conveyed as hereit before provided, and shall be liable only for wilful or intentional breaches of the trust hereby created and imposed in him, and the said trustee shall not be under

- 137 any obligation to take any action in executing this trust, which in his opinion will be likely to involve him in expense or liability unless the said Consolidated Turnpike Company or one or more of the bondholders, or some one for them, shall give him reasonable indemnity against such expense or liability, and the said trustee may resign and discharge himself of the trust hereby created by giving three months' notice in writing of his intention so to do to the said Consolidated Turnpike Company of Norfolk, Virginia, or such shorter notice as the said company may accept as adequate and that said trustee may be removed at any time by written order or notice duly signed by the holders of a majority in interest of the bonds issued hereunder then outstanding on payment of the reasonable charges of said trustee for the services and expenses of himself, his attorneys and agents to the date of service of said order and notice in creating and discharging the trusts herein declared. And whenever a vacancy shall occur in the office of trustee herein by resignation or otherwise the Board of Directors of the said Consolidated Turnpike Company shall have the right to appoint a successor or successors to fill such vacancy which appointment shall be attested by certificate in writing of the president and secretary of the said Consolidated Turnpike Company of Norfolk, Virginia, under its corporate seal, and shall be duly acknowledged and recorded in the clerk's office of the County Courts of Norfolk and Princess Anne County, in the State of Virginia, and notice of such appointment shall be given by publication once a week for four successive weeks in at least one newspaper published in the City of Norfolk, Virginia, and the successor or successors appointed as aforesaid shall continue to be the trustee or trustees hereunder until a majority in interest of the holders of the bonds hereby secured and then outstanding shall upon the satisfaction of the reasonable claims, if any, of the trustee for the expenses incurred or services rendered up to that time, by an instrument or concurrent instruments in writing, executed under their hands and seals, or the hands and seals of their attorneys in fact for that purpose, appoint a new trustee or trustees to act hereunder in which event upon the filing of said instrument or instruments in said clerk's office of Norfolk County and Princess Anne Courts, the trustee or trustees, thereby appointed shall without any further act or deed become the trustee or trustees hereunder, and if the said Board of Directors shall for thirty days neglect or refuse to fill any such vacancy or if the majority in interest of the bondholders shall not be satisfied with the trustee or trustees so appointed, the same may be filled by the majority in interest of the bond-
- 138 holders by making and filing for record the instrument or instruments of appointments or appointment as aforesaid, and when an appointment shall be made by a majority in interest

of the holders of outstanding bonds as aforesaid, it shall supersede any appointment made otherwise. And it is mutually covenanted that any instruments in writing required or authorized by any of the provisions of this deed to be executed by the holders of the bonds hereby secured or any of them may be in any number of parts and the execution thereof and the dates of holding and ownership of bonds shall be deemed sufficiently proved for the purposes of this deed if a notary public or some other officer authorized by the laws of any State where the paper is executed to take acknowledgments of deeds shall under his official seal certify that each of the several parties signing the same as upon the date therein, certified duly acknowledged before him the execution thereof and exhibited to him as the property of such subscriber or if he sign as attorney in fact, of his principal, bonds of the description of those hereby secured of the amounts and bearing the serial numbers therein stated, and in like manner the execution of each power of attorney under which any person shall claim to act for another in signing such instrument shall be sufficiently proved if acknowledged before and certified by any other such officer under his official seal. In the event of a sale by the said trustee of the property, works, rights and franchises hereby conveyed, or any part thereof, as hereinbefore provided, the purchaser or purchasers thereof shall in making settlement therefor, be entitled to use towards payment the bonds held by said purchaser or purchasers, whereof the net proceeds of such sale shall be legally applicable, reckoning said bonds so used at such sum as shall be payable out of the net proceeds on account thereof, and if the net proceeds applicable to said bonds shall be sufficient to pay them in full, the person or persons making such sale and entitled to receive the purchase money, shall receive the bonds and cancel the same, but if the net proceeds applicable to such payment shall not be sufficient to pay the bonds in full due endorsement shall be made as a credit upon said bonds of the amount realized on account thereof. But if no default in payment or breach of covenant is made by the said Consolidated Turnpike Company of Norfolk, Virginia, and the said Consolidated Turnpike Company of Norfolk, Virginia, its successors or assigns, shall pay, or cause to be paid unto the holders of the bonds intended to be secured hereby, the several and respective sums represented therein on the day and year set for the payment thereof, together with the interest thereon, according to the provisions and stipulations of said bonds and of this deed, and shall well and truly keep and perform all the stipulations, covenants and

139 agreements herein required to be kept and performed by it, according to the true intent and meaning thereof, then and from thenceforth, as well, the said bonds as lien created by this deed the estate hereby granted, shall cease, determine and become void, and the said trustee, for himself, and his successor or successors, in trust, hereby covenants that satisfaction shall be promptly entered of this encumbrance, and that he will at its cost and expense execute and deliver to the said Consolidated Turnpike Company of Norfolk, Virginia, its successors or assigns, a full and complete release of the property, works, rights and franchises hereby conveyed.

The said Consolidated Turnpike Company of Norfolk, Virginia, hereby covenants that it will warrant generally the property hereby conveyed.

In witness whereof, the said Consolidated Turnpike Company of Norfolk, Virginia, hath caused these presents to be executed in its name by H. L. Page, its president, and its corporate seal to be hereto affixed and attested by H. C. Whitehead, its secretary, and the said trustee hath hereto set his name and affixed his seal.

CONSOLIDATED TURNPIKE COMPANY OF
NORFOLK, VIRGINIA,

By H. L. PAGE, *Its President.*

Attest:

[SEAL.]

H. C. WHITEHEAD,

Its Secretary.

WALTER H. TAYLOR, *Trustee.*

[SEAL.]

N. & O. R. Co. No. 3.

Deed from Consolidated Turnpike Company to Bay Shore Terminal Company.

Filed April 26, 1907.

This deed made the first day of March, in the year nineteen hundred and two, between the Consolidated Turnpike Company of Norfolk, Virginia, a corporation duly chartered and organized under the laws of the State of Virginia, party of the first part, and 140 the Bay Shore Terminal Company, a corporation also duly chartered and organized under the laws of the said State, party of the second part.

Whereas, the Consolidated Turnpike Company of Norfolk, Virginia, is the owner of a certain right of way extending from a point near the gate of the Norfolk City Park, to a point at or near Ocean View, in the County of Norfolk, used in the operation of its toll road and bridges, and also of a parcel of land north of and adjoining Tanners Creek, which were acquired, along with other property and rights, under a deed from the Tanners Creek Drawbridge Company, dated the 2nd day of April, 1900, and duly recorded in the clerk's office of said Norfolk County Court, Deed Book 237, page —; and

Whereas, the said right of way consisted in part, of a strip of land eighteen feet wide, adjoining on the west the road acquired under the deed of Michael Hendren and wife to the Indian Poll Drawbridge Company, dated May 10th, 1851, duly of record, and extending from a point opposite the northwest corner of the Norfolk City Park down to Tanners Creek, the said strip having been acquired by the said Tanners Creek Drawbridge Company by condemnation, and also in part of a strip of land twenty-five feet wide extending from Tanners Creek in a northerly direction to a point near Ocean View, the said strip lying on the west of the toll road, and having been

acquired by the said Tanners Creek Drawbridge Company in part by purchase and in part by condemnation; and

Whereas, the said Bay Shore Terminal Company desires to acquire for its purposes (of an electrical railroad) the strip of land above described eighteen feet wide, extending from a point opposite the northwest corner of the Norfolk City Park down to Tanners Creek and also the strip of land above described twenty-five feet wide, extending from Tanners Creek in a northerly direction to a point near Ocean View, and also a parcel of land north of and adjoining Tanners Creek, all which are hereinafter more particularly described, and has offered in consideration therefor, to assign, transfer and turn over to the said Consolidated Turnpike Company of Norfolk, Virginia, \$22,500 of the five per cent. coupon bonds of it, the said Bay Shore Terminal Company, secured by a deed of trust on all the property and franchises of it, the said Bay Shore Terminal Company, and \$5,625 of the fully paid up capital stock of it, the said Bay Shore Terminal Company (any fractional part of said last named sum not paid in stock to be paid in cash), and also to construct, at the cost of it, the said Bay Shore Terminal Company, a new combination iron and steel draw on the bridge of the said Consolidated Turnpike Company of Norfolk, Virginia, across Tanners Creek, of the best

141 modern construction, and of sufficient width to comply with the requirements of the navigation laws of this State or of the United States, or both, and also such additions to the said bridge for widening and strengthening it or otherwise to enable the said Bay Shore Terminal Company, its successors or assigns, to cross the said creek for its or their purposes, without interfering in any way with the present use of the said bridge by the said Consolidated Turnpike Company of Norfolk, Virginia, its successors or assigns, for its or their purposes, and also to maintain the said draw, and so much of the said bridge as may be constructed by it, the said Bay Shore Terminal Company, its successors or assigns, at the cost and expense of it, the said Bay Shore Terminal Company, its successors and assigns, and in such manner that the said structure shall not in any way interfere with the passage over or use of the said bridge of the Consolidated Turnpike Company of Norfolk, Virginia, its successors and assigns, and also in the event that it shall be determined to operate the said draw by electricity, to furnish the electric current necessary to operate the same, and also to indemnify and save harmless the said Consolidated Turnpike Company of Norfolk, Virginia, its successors and assigns, against and from all loss and damage which it, the said Consolidated Turnpike Company of Norfolk, Virginia, its successors or assigns, may suffer or sustain, or be held liable for in any proceeding, by any person by reason of any negligence on the part of the said Bay Shore Terminal Company, its successors or assigns, or its or their agents, servants or employees, in its or their use of the said strip of land or bridge or draw, or any part thereof, for the purpose of it, the said Bay Shore Terminal Company, its successors and assigns, and that it, the said Bay Shore Terminal Company, its successors and assigns, will defend, at it or their costs any suit or suits brought to recover the

same; and with the understanding on the part of the said Bay Shore Terminal Company that the bonds and stock which are to be transferred or paid to the said Consolidated Turnpike Company of Norfolk, Virginia, as a part of the consideration above mentioned, shall be transferred and turned over to Walter H. Taylor, trustee, to be held by him under the deeds hereinafter mentioned and recited, primarily to secure the bonds issued by the said Tanners Creek Drawbridge Company, and after that to secure the bonds issued by the said Consolidated Turnpike Company of Norfolk, Virginia, with the right on the part of the said Consolidated Turnpike Company of Norfolk, Virginia, its successors or assigns, to receive the interests, dividends and income from said bonds and stock, according to the terms of the deeds of trust hereinafter mentioned and recited, one from the said Tanners Creek Drawbridge Company, and the other from the said Consolidated Turnpike Company of Norfolk, Virginia, to the said Walter H. Taylor, trustee; and

Whereas, before the conveyance aforesaid to the said Consolidated Turnpike Company of Norfolk, Virginia, the said Tanners Creek Drawbridge Company, by deed dated the first day of June, 1898, and duly recorded in the clerk's office of said Norfolk County Court, Deed Book 215, page 400, had conveyed to Walter H. Taylor, trustee, all its property, rights and franchises, to secure certain coupon bonds therein described, aggregating the sum of \$25,000, upon the terms and conditions in the said deed set forth, to which reference is here made, subject to which deed and also to a floating indebtedness of \$1,000, the said conveyance was made to the said Consolidated Turnpike Company of Norfolk, Virginia; and

Whereas, the said Consolidated Turnpike Company of Norfolk, Virginia, by its deed, dated the 2nd day of April, 1900, and duly recorded in the clerk's office of said Norfolk County Court, Deed Book, 238, page —, conveyed to the said Walter H. Taylor, trustee, all its property, rights and franchises, including those acquired under the said deed of the Tanners Creek Drawbridge Company, to secure certain bonds therein described, aggregating the sum of \$200,000, upon the terms and conditions in the said deed set forth, to which deed reference is here made, of which bonds \$25,000 thereof have, in fact been retained by the said Consolidated Turnpike Company of Norfolk, Virginia, as required by a resolution of the stockholders of said Consolidated Turnpike Company of Norfolk, Virginia, recited in said deed for the purpose of meeting the said bonds, aggregating \$25,000, issued by the said Tanners Creek Drawbridge Company, and the floating indebtedness of \$1,000 aforesaid; and

Whereas, in each of said two deeds of trust, it is provided, among other things, that until default be made in the payment of the principal or interest of the bonds thereby secured or some covenant therein contained should be broken, the grantor therein should have full power and authority to possess, manage, operate and enjoy the estate, rents, issues and profits thereof, in the same manner and with the same effect as if the said deed, in each case, had not been

made; and whereas the right of way hereby conveyed and herein-after described, was acquired by the said Tanners Creek Draw-bridge Company under and by virtue of an act of the General Assembly of Virginia entitled "An act to amend and re-enact an act entitled an act to incorporate Tanners Creek Drawbridge

143 Company," approved February 17, 1898, with power, given by said act, "to sell or lease along its turnpike a right of way to any company or companies for the operation of an electric rail-road, a bicycle path, or other similar enterprise," to all which rights and powers the said Consolidated Turnpike Company of Norfolk, Virginia, succeeded, under and by virtue of the deed aforesaid from the said Tanners Creek Drawbridge Company to the said Consolidated Turnpike Company of Norfolk, Virginia, dated April 2nd, 1900; and

Whereas the said Consolidated Turnpike Company of Norfolk, Virginia, having agreed by and through its Board of Directors to accept the offer of the said Bay Shore Terminal Company to purchase the right of way and property hereinbefore mentioned and hereinafter more particularly described, upon the terms and conditions and for the consideration hereinbefore recited, and made report thereof, at a meeting of the stockholders of the said Consolidated Turnpike Company of Norfolk, Virginia, held on the 21st day of January, 1902, the following resolution was adopted:

"Resolved, that the action of the Board of Directors and the resolution of the same, as adopted at the meeting of November 12th, 1901, in selling to the Bay Shore Terminal Company the right of way on the west side of the Tanners Creek Road from the City Park to Ocean View, and also the lot of land fronting 315 feet on the east side of said road for the purpose of locating and erecting thereon their power station and car barns, is hereby confirmed and approved, and proper officers of the company are authorized accordingly to sign the necessary deed for the same, it being understood that the consideration of such sale is \$22,500 of the first mortgage 5% bonds and \$5,625 of the capital stock of the said Bay Shore Terminal Company."

Now, therefore this deed witnesseth, that for and in consideration of the premises, and of the sum of twenty-eight thousand one hundred and twenty-five dollars of the bonds and stock of the said Bay Shore Terminal Company, and of the covenants, promises and agreements hereinafter contained made on the part of the said Bay Shore Terminal Company, the said Consolidated Turnpike Company of Norfolk, Virginia, doth grant, with general warranty, unto the said Bay Shore Terminal Company, all the right of way and estate, whether acquired by purchase or in condemnation proceedings by the said Tanners Creek Drawbridge Company, and now owed by it the said Consolidated Turnpike Company of Norfolk, Virginia, of, in and to that strip of land eighteen feet wide, adjoining on the west to the road which was conveyed to the Indian Poll
144 Drawbridge Company by the late Michael Hendren and wife by deed dated the 10th day of May, 1851, now owned and controlled by the said Consolidated Turnpike Company of Norfolk,

Virginia, and extending from a point opposite the northwest corner of the Norfolk City Park to Tanners Creek, and of, in and to a strip of land twenty-five feet wide, lying also on the west side of the road of the said Consolidated Turnpike Company of Norfolk, Virginia, and extending the whole length of said road from Tanners Creek in a northerly direction to a point near Ocean View; also a lot or parcel of land north of and adjoining Tanners Creek, bounded and described as follows: Beginning at a point on the eastern line of the toll road in Talbot's line, marked A, and running thence S. $72^{\circ} 22'$ E. 142 feet, and thence S. $40^{\circ} 30'$ E. to Tanners Creek, and then beginning again at the starting point and running S. $10^{\circ} 30'$ W., along the said toll road 315 feet, and thence S. $79^{\circ} 29'$ E., to Tanners Creek and bounded on the east by Tanners Creek, as shown on a plat hereto annexed, together with the perpetual right in the said Bay Shore Terminal Company, its successors and assigns, to cross the turnpike of the said Consolidated Turnpike Company of Norfolk, Virginia, with not more than two tracks, north of and near Tanners Creek, for the purpose of enabling the said Bay Shore Terminal Company to reach its car barns, with its cars, from the said strip of land on the west extending from said Tanners Creek northerly to a point near Ocean View, hereby conveyed.

And the said Bay Shore Terminal Company, for itself its successors and assigns, doth hereby covenant and agree to and with the said Consolidated Turnpike Company of Norfolk, Virginia, its successors and assigns, that it, the said Bay Shore Terminal Company, shall and will, at the cost of it, the said Bay Shore Terminal Company, its successors and assigns, construct a new combination iron and steel draw on the bridge of the said Consolidated Turnpike Company of Norfolk, Virginia, across Tanners Creek, of the best modern construction and of sufficient width to comply with the navigation laws of the United States or of the State of Virginia, or both, and also such additions to the said bridge for widening and strengthening it or otherwise to enable the said Bay Shore Terminal Company, its successors or assigns, to cross the said creek for its or their purposes, without interfering in any way with the present use of the said bridge by the said Consolidated Turnpike Company of Norfolk, Virginia, its successors or assigns, for its or their purposes, and also shall and will maintain the said draw, and so much of the said bridge as may be constructed by it, the said Bay Shore

145 Terminal Company its successors or assigns, for its or their purposes, and also shall and will — Terminal Company, its successors and assigns, and in such manner that the said structure shall not in any way interfere with the passage over or use of the said Consolidated Turnpike Company of Norfolk, Virginia, and also in the event that it shall be determined to operate the said draw by electricity, shall and will furnish the electric current necessary to operate the same; and also shall and will indemnify and save harmless the said Consolidated Turnpike Company of Norfolk, Virginia, its successors and assigns, against and from all loss and damage which it, the said Consolidated Turnpike Company of Norfolk, Virginia, its successors or assigns, may suffer or sustain or be held liable

for in any proceeding by any person, by reason of any negligence on the part of the said Bay Shore Terminal Company, its successors or assigns, or its or their agents, servants or employees, in its or their use of the said strips of land or bridge or draw or any part thereof for the purposes of it, the said Bay Shore Terminal Company, its successors or assigns; and shall and will defend, at its or their costs, any suit or suits brought to recover the same.

And the said Consolidated Turnpike Company of Norfolk, Virginia, for itself its successors and assigns, doth hereby covenant, promise and agree, to and with the said Bay Shore Terminal Company of Norfolk, Virginia, for itself, its successors and assigns, *doth hereby covenant, promise and agree, to and with the said Bay Shore Terminal Company, its successors and assigns* that it has the right to convey the property hereby conveyed to the grantee; that the grantee shall have quiet possession of the said property; free from all encumbrances, except such rights of reversion as the owners of any part of said lands acquired in condemnation proceedings or otherwise may have; that it, the said Consolidated Turnpike Company of Norfolk, Virginia, has done no act to encumber the said property, saving and excepting the deed of trust hereinbefore mentioned and recited; that it, the said Consolidated Turnpike Company of Norfolk, Virginia, its successors and assigns, will execute such further assurances of the property hereby conveyed as may be requisite; and that the bonds and stock hereinbefore mentioned as a part of the consideration of this deed shall and will be transferred and turned over to Walter H. Taylor, trustee, to be held by him under the deeds to him hereinbefore mentioned and recited, primarily, to secure the bonds issued by the said Tanners Creek Drawbridge Company, and after that to secure the bonds issued by the said Consolidated Turnpike Company of Norfolk, Virginia, hereinbefore mentioned the said Consolidated Turnpike Com-
 146 pany of Norfolk, Virginia, however, reserving for itself its successors and assigns, the right to receive the interest, dividends and income from said bonds and stock according to the terms of each of said deeds of trust.

In witness whereof the said Consolidated Turnpike Company of Norfolk, Virginia, hath caused this deed to be executed in its name, by George L. Neville, vice-president, and its corporate seal to be hereto affixed, attested by H. C. Whitehead, its secretary, and the said Bay Shore Terminal Company hath caused this deed to be executed in its name by H. L. Page its president, and its corporate seal to be hereto affixed, attested by J. A. Groner, its secretary.

CONSOLIDATED TURNPIKE COMPANY,
 NORFOLK, VA.,

By GEO. L. NEVILLE, *Vice-President.*

H. C. WHITEHEAD, *Secretary.*

BAY SHORE TERMINAL COMPANY,

By H. L. PAGE, *President.*

J. A. C. GRONER, *Secretary.*

TAYLOR

VS.

NORFOLK & OCEAN VIEW RAILWAY COMPANY.

Opinion of Circuit Court of Appeals.

The proceeding in which the decree appealed from was entered was in the nature of a supplemental bill or petition filed in the case of Charles E. Fink v. Bay Shore Terminal Company and others. That was a foreclosure suit under a deed of trust made by the Bay Shore Terminal Company, in which a decree was entered for the sale of the property involved in the present supplementary proceeding, and it was sold to the Norfolk & Ocean View Railway Company, a corporation of Virginia, the present complainant. The property so sold was an electric street passenger railway, with its road-
 147 bed, rights of way, lands, buildings, bridges, and structures, power plant cars, and equipment of every kind, beginning at a point near Ocean View, in the County of Norfolk, and extending thence southwardly to the City of Norfolk, Va., together with the franchises, powers, rights and privileges of the Bay Shore Terminal Company and the estate, right, title and interest of said company in and to the same. The controversy in the present proceeding has reference to a strip of land about six miles long, extending from Ocean View to near the City of Norfolk, constituting the right of way on which the rails of the Norfolk & Ocean View Railway Company are placed and the plot of land on which its power house is erected.

The history of the title to this strip of land is as follows: The Tanners Creek Drawbridge Company in 1865 was empowered to construct and maintain a turnpike from Norfolk to Ocean View, and by amendments to its charter was empowered to widen its road and to "sell or lease along its turnpike a right of way to any company or companies for the operation of an electric railroad and bicycle path or other similar enterprise." In 1898 the Tanners Creek Drawbridge Company mortgaged its property and franchises to Walter H. Taylor, trustee, to secure an issue of bonds amounting to \$25,000, which are still outstanding. In 1900 the Consolidated Turnpike Company acquired with other turnpikes, the turnpike of the Tanners Creek Drawbridge Company, subject to the \$25,000 mortgage. Thereupon the Consolidated Turnpike Company mortgaged its property to said Walter H. Taylor, trustee, to secure \$200,000 of its bonds, a part of which were issued and are still outstanding. Thereupon the Bay Shore Terminal Company was incorporated to construct an electric railway from Norfolk to Ocean View upon the strip of land acquired as aforesaid by the Consolidated Turnpike Company from the Tanners Creek Drawbridge Company.

The persons organizing the Bay Shore Terminal Company were, it is alleged, and not denied, the same persons, who controlled the Consolidated Turnpike Company, the Boards of Directors were substantially the same, and H. L. Page was president of both companies. Under these circumstances the Consolidated Turnpike Com-

pany sold to the Bay Shore Terminal Company the land and right of way in controversy. The consideration thereof was \$22,500 of the bonds of the Bay Shore Terminal Company, \$5,625 at the par value of the stock of the Bay Shore Terminal Company, an agreement by the Terminal Company to build and maintain a new draw-bridge over Tanners Creek, and an agreement by it to furnish

148 without cost the electricity to operate the draw, if the same was operated by electric current. In consideration of the said bonds and stock and agreements, the Consolidated Company conveyed to the Terminal Company with general warranty the strip of land in, question, being the whole length of the road to Ocean View, and provided in the deed that the bonds and stock mentioned as a part of the consideration given for the deed should be transferred and turned over to Walter H. Taylor, trustee, to be held by him under the mortgage deeds to him to secure first the bonds issued by the Tanners Creek Drawbridge Company, and, secondly, to secure the bonds issued by the Consolidated Turnpike Company. The bonds and stock were subsequently put into the custody of the said Walter H. Taylor, and subsequently they were placed in the hands of a committee who were negotiating a reorganization of the lien claims against the Bay Shore Terminal Company.

The Bay Shore Terminal Company had made a large issue of mortgage bonds, and becoming insolvent, receivers of it were appointed in the aforementioned case of Fink v. Bay Shore Terminal Company, in which this supplemental bill was filed. A decree for foreclosure having been entered, a sale was made, and the Norfolk and Ocean View Railway Company became the owner of the property. During the proceeding under the receivership, prior to the decree of sale, the special master reported to the court as follows:

"It appears from the said deeds that the title of the Bay Shore Terminal Company to its right of way from Norfolk City Park to Ocean View, and to the said parcel of land, is incumbered by the liens of said deeds of trust. The consideration paid by the Bay Shore Terminal Company to the Consolidated Turnpike Company was in bonds and in work, as stated in the deed of the last named company to the Bay Shore Terminal Company, and was at the time said deed was made, in the opinion of the special master, ample consideration for a good, sufficient and perfect title to said right of way and parcel of land, and there is no further obligation on the part of the Bay Shore Terminal Company to the Consolidated Turnpike Company to be performed before the said Consolidated Turnpike Company shall make its deed to the Bay Shore Terminal Company perfect. The special master, therefore, recommends that the receivers of the Bay Shore Terminal Company be required to demand of the Consolidated Turnpike Company such action on its part as will release the said right of way and parcel of land from the incumbrances of said deeds of trust and in the event said Consolidated Turnpike Company shall refuse and fail to do so, the said receivers shall be required to clear the title of the said right of way and

149 parcel of land of all incumbrances, by condemnation proceedings or otherwise. While the receivers have not been

and may not be, disturbed in the possession and use of such right of way and parcel of land, the title to the same is a matter of such vital interest to any future purchaser or owner of the said Bay Shore Terminal Company that it should not be left with any cloud upon it."

And the court thereupon entered the following order:

"This cause came on this day to be again heard upon the papers formerly read; and it appearing to the court, from the report of Special Master, R. T. Thorp, that the said Bay Shore Terminal Company has never acquired title to a portion of its right of way and to the property upon which its power house is located, the court doth adjudge, order and decree that B. W. Leigh, H. L. Page, and J. A. C. Groner, receivers, do proceed in the proper court or courts to institute condemnation proceedings for the purpose of acquiring title to said property, and said receivers are hereby authorized to take any and all necessary steps to institute and conduct said condemnation proceedings to as speedy a determination as possible.

EDMUND WADDILL, JR.,

U. S. Judge.

January 20, 1906.

Thereupon the receivers did institute condemnation proceedings in the Circuit Court of Norfolk County to condemn any outstanding interest in the land in controversy but a certain Arthur W. Depue, having bought some of the Consolidated Company bonds, intervened in the condemnation case, and the same is still pending and unsettled. While the condemnation case instituted by the receivers appointed by the court below was still pending in the State Court the decree for the foreclosure sale was entered and the property sold. By the sixteenth clause of the decree it was provided that:

"All questions as to the distribution of the proceeds of sale and all questions of costs, expenses and allowances, and all other questions not disposed of by this decree, or which may properly arise under the same, or are proper subjects for further direction, are reserved."

In the deed executed to the Norfolk & Ocean View Railway Company, a draft of which was submitted to the court and expressly approved by order of the court, it is stated that the conveyance is made "with the benefit of and subject to all suits or proceedings which have been or might be instituted by said receivers." Afterwards the said Arthur W. Depue, as owner of certain of the said mortgage bonds issued by the Consolidated Turnpike Company, instituted in the State County Court proceedings for the foreclosure of the mortgage and the sale of the strip of land on which the railway sold by the court below was constructed. Thereupon the Norfolk & Ocean View Railway Company, the complainant in this supplemental case, filed its supplemental bill and petition, praying:

"(1) That said court would construe the scope and effect of its various decrees, deeds, and other acts in said suit, in so far as they

affected the rights of the purchaser; (2) that the court would adjudge that a full consideration had been paid to Walter H. Taylor, trustee, for the strip of land in controversy, and remove the cloud from the title thereto caused by the several deeds of trust hereinbefore recited, and that Walter H. Taylor, trustee, might be brought before the court for that purpose, or, as an alternative relief, that Walter H. Taylor, trustee, be required to surrender the consideration in the form of bonds and stock of the Bay Shore Terminal Company received and held by him as aforesaid; (3) that the court would take such steps as might be necessary to protect the title conveyed to the purchaser under its decrees aforesaid and to this end that it would enjoin Arthur W. Depue and Walter H. Taylor, trustee in the deed of trust aforesaid, from taking any action, in the State Court or otherwise to disturb the rights or the possession of the Norfolk & Ocean View Railway Company, acquired under decrees of the Circuit Court of the United States in the case of Finke v. Bay Shore Terminal Company, as aforesaid, until such rights could be finally determined and litigated by that court."

A temporary restraining order was granted and subsequently a plea having been filed by Arthur W. Depue, and answers by Walter H. Taylor, trustee, and by the Consolidated Turnpike Company, together with numerous affidavits a hearing was had, and the court thereupon, on September 27, 1907, granted a preliminary injunction, enjoining until the further order of the court Arthur W. Depue, Walter H. Taylor, trustee, and the Consolidated Turnpike Company from "prosecuting any suit against the Consolidated Turnpike Company so far as the same affects the title or ownership of the property conveyed by the commissioners of this court to the said petitioner in the above entitled suit, or from doing any act or thing affecting the possession use and enjoyment by the said Norfolk & Ocean View Railway Company of that certain parcel of land

151 between Norfolk and Ocean View occupied by said company as its right of way, being the same land which was conveyed to the said company by the commissioners of this court under decree in this cause of the 17th day of February, 1907."

It thus appears that the court below held that it had jurisdiction to entertain the supplemental bill and to maintain the then status until the supplemental bill could be finally heard. The questions now before us are as to the jurisdiction of the court below to entertain the bill, and, if it had jurisdiction, as to the exercise of its discretion in granting the injunction.

It is not to be denied that in the original case, in which the decree for sale was entered and the sale made, the question of the lien of the prior mortgages on this right of way was brought to the attention of the court and was dealt with by the court. By its order of January 20, 1906, the court directed its receivers to proceed by condemnation proceedings to acquire the outstanding interest vested in Walter H. Taylor, trustee, by the mortgage deeds, and the receivers, acting by authority of the court, instituted that proceeding March 3, 1906, which was in rem of which every one having any interest in the subject matter was bound to take notice. In those

proceedings Arthur W. Depue appeared and demurred; but his demurrer was overruled, and he then answered generally. The State Court then appointed commissioners, who made their report, which was excepted to by the said Depue. These exceptions, we understand, have not been disposed of, and the case remains pending.

This condemnation proceedings having been so instituted by authority of the court which had possession of the railroad property having been sold as a going concern, with all its rights of way, franchises and privileges, it seems clear that when the deed of conveyance recites that the deed conveys the right of way and land in question, "with the benefit of and subject to all suits or proceedings which have been or may be or might be instituted by said receivers," it refers to this very condemnation proceeding designed to acquire whatever remnant of title remained in the trustee to whom the title had been conveyed to secure the mortgage bonds in question. The attempt to foreclose that mortgage by the appellant was an attempt after the condemnation proceedings was instituted to render those proceedings nugatory by selling the property to be condemned, including with it the railroad which had been built on the right of way, and to complete which the court's receivers had spent several hundred thousand dollars, and for which the purchasers at the court sale had paid \$765,000.

It would seem that every equitable consideration supports the right of the court to protect its purchaser by enjoining the foreclosure and sale of this right of way and strip of land until the condemnation proceedings are concluded. While the property was in the actual custody of the court, no foreclosure by the appellant could take place without its consent. The court directed its receivers to clear the title by condemnation proceedings but before those proceedings were concluded it sold the property; but by its conveyance is reserved to the purchaser the benefit of the condemnation proceeding, the object of which was to condemn the very mortgage interest which the appellant purposes now to enforce. It seems to us clear that it was within the jurisdiction of the court below to make its decree effective by the injunction which is granted, and that the injunction was necessary in order to protect the rights for which the purchaser, under the court's sale, paid his money. *Julian v. Central Trust Co.*, 193 U. S., 93, 24 Sup. Ct. 399, 48 L. Ed. 629; *Wabash R. R. v. Adelbert College*, 208 U. S. 38-53, 28 Sup. Ct. 182, 52 L. Ed. 379.

Affirmed.

And said defendant, Arthur W. Depue, having moved the court to confirm that portion of the report of the commissioners theretofore appointed to ascertain a just value of so much of the land whereof the Bay Shore Terminal Company was tenant of the freehold, filed on the 29th day of June, 1906, which finds and ascertains a just compensation to all persons or corporations having any interest in or claims against or liens upon the land and property in these proceedings mentioned, to be the sum of \$57,200, which said sum also includes the value of the improvements placed upon said land after the purchase of said land by the said Bay Shore Terminal Company,

as well as the value of the land itself, as of the time of the filing of the commissioner's report, and the said Norfolk and Ocean View Railway Company, by counsel, claiming to appear specially for that purpose, objected to the confirmation of so much of said report as includes the value of the improvements placed on said land by the said Bay Shore Terminal Company after its purchase as aforesaid, which said motion of the said Norfolk and Ocean View Railway Company, claiming to appear specially for that purpose, the
153 court overruled, to which action of the court in overruling said motion the said Norfolk and Ocean View Railway Company, by counsel, excepts and tenders this, its Bill of Exceptions No. 7, and prays that the same may be signed, sealed, and made a part of the record herein, and the same is accordingly done, this 29th day of September, 1909.

B. D. WHITE, [SEAL.]
*Presiding Judge of the Circuit Court of the
County of Norfolk, Va.*

Bill of Exceptions No. 8.

Be it remembered, that on the trial and hearing of this cause, upon the motion of Arthur W. Depue to confirm the report of the commissioners theretofore appointed to ascertain the just value of so much of the land whereof the Bay Shore Terminal Company was the tenant of the freehold, came the Norfolk and Ocean View Railway Company, the purchaser of the property and franchises of the Bay Shore Terminal Company, pursuant to the decree of the Circuit Court of the United States for the Eastern District of Virginia in Charles E. Fink v. Bay Shore Terminal Company and others, and objected to the motion of the said Arthur W. Depue to confirm said report, for the reason that the report of said commissioners, filed in the Circuit Court of the County of Norfolk, on June 29th, 1906, is not co-extensive with the terms of the order appointing them and authorizing them to act, which said objection of the said Norfolk and Ocean View Railway Company the court overruled, to which said action of the court in overruling said motion, the said Norfolk and Ocean View Railway Company excepts, and prays that this, its Bill of Exception No. 8, may be signed, sealed, and made a part of the record herein, and the same is accordingly done, this 29th day of September, 1909.

B. D. WHITE, [SEAL.]
*Presiding Judge of the Circuit Court
of the County of Norfolk, Va.*

STATE OF VIRGINIA,
County of Norfolk, To wit:

I, Alvah H. Martin, Clerk of the Circuit Court of Norfolk County,
154 State aforesaid, do hereby certify that the foregoing is a true transcript from the records in the case named. I further certify that said transcript was not made up and completed

until the defendants had had due notice of the making of the same, as required by law.

Given under my hand this 19th day of October, in the year 1909.

ALVAH H. MARTIN, *Clerk.*

By CORA P. PARKER, *D. C.*

A Copy.

Teste:

H. STEWART JONES, *C. C.*

155 SUPREME COURT OF APPEALS,

State of Virginia, ss:

I, H. Stewart Jones, Clerk of said Court, do hereby certify that the foregoing pages from 1 to 156, inclusive, are a true, full and complete transcript of the record and proceedings, in the case of Norfolk & Ocean View Railway Company, Appellant v. The Consolidated Turnpike Company, Walter H. Taylor, Trustee and Arthur Dupue, Appellees, and also of the opinion and orders, together with petition for rehearing, as the same now appear on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in Richmond, this 14th day of October, 1910.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

H. STEWART JONES,

Clerk Supreme Court of Appeals of Virginia.

SUPREME COURT OF APPEALS OF VIRGINIA, *ss:*

I, James Keith, one of the Judges and President of the Supreme Court of Appeals of Virginia, hereby certify that the foregoing attestation made by H. Stewart Jones, the Clerk of the said Court, is in due form, and that the foregoing is his true and genuine signature.

Given under my hand and seal this 14th day of October, 1910.

JAMES KEITH, [SEAL.]

President Supreme Court of Appeals of Virginia.

SUPREME COURT OF APPEALS,

State of Virginia, ss:

I, H. Stewart Jones, Clerk of the Supreme Court of Appeals of the State of Virginia, do hereby certify that the honorable James Keith, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, one of the Judges and President of the Supreme Court of Appeals of the State of Virginia, duly commissioned and qualified.

Witness my hand and the seal of said court this 14th day of October, 1910.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

H. STEWART JONES,

Clerk Supreme Court of Appeals of the State of Virginia.

156

Circuit Court of Norfolk County.

NORFOLK & OCEAN VIEW RAILWAY COMPANY,
v.

CONSOLIDATED TURNPIKE COMPANY, et als.

Opinion by Judge John A. Buchanan.

WYTHEVILLE, VA., June 9, 1910.

This is a condemnation proceeding instituted in the Circuit Court of Norfolk County by the receivers of the Circuit Court of the United States for the Eastern District of Virginia in the cause of Fink v. Bay Shore Terminal Company and others. Before a consummation of the proceedings for condemnation, the property sought to be condemned, together with other property, was sold under a decree in the cause in which the receivers were appointed, the sale confirmed, and the purchaser, the Norfolk & Ocean View Railway Company, the plaintiff in error, received a conveyance of the property purchased, "with the benefit of and subject to all suits or proceedings which have been or may be, instituted by the said receivers."

At the time of the institution of the proceedings to condemn, the predecessor in title of the plaintiff in error was in possession of the property sought to be condemned under a conveyance from the Consolidated Turnpike Company, which purported to convey, with covenants of general warranty, the land sought to be condemned, but which at that time was subject to a lien created by a deed of trust properly recorded.

When the report of the commissioners appointed in this proceeding to ascertain the compensation and damages for the property to be condemned was filed, it was excepted to by appellee, Arthur W. Depue, one of the holders of the bonds secured by the said deed of trust. Before any action by the court upon the said report and the exceptions thereto, the grantor company in the deed of trust having defaulted in the payment of interest on the bonds secured by it, a judgment was rendered against that company, and a bill filed to subject the trust property to the payment of the debts secured upon it. Thereupon the appellant filed a pleading in the Circuit Court of the United States in the cause in which the property had been sold, for the purpose, among others, of injoining and prohibiting Walter H. Taylor, the trustee in the said deed of trust, and Depue, one of the beneficiaries therein, from enforcing the same against the property sought to be condemned until there had been a decision of the State court in this condemnation proceeding. That court granted the relief, and the Circuit Court of Appeals of the United States, upon appeal, affirmed the lower court.

After Taylor, trustee, and Depue, appellees, had been enjoined from enforcing the lien of the said deed of trust until there had been a decision of the State Court in the condemnation proceeding, Depue abandoned certain of his exceptions to the report of the com-

missioners of condemnation, in which abandonment Taylor, trustee, united, and they moved the court to confirm said report in so far as it ascertained compensation, etc., for the land taken, including the improvement placed thereon by the appellant or its predecessor in title. At the same time the appellant, which had never been made a party to the condemnation proceeding, appeared specially, as it claimed, and moved the court to dismiss and vacate the proceedings had in the cause, and to discontinue it. The court overruled the appellant's motion, held that its appearance was general, entered an order sustaining the motion of the appellees allowing compensation for the land taken including the value of the improvements placed thereon by the appellant or its predecessor in title, directed that the appellant within three months deposit that sum with interest in some National bank of the city of Norfolk to the credit of the court and subject to its further order. To that order this writ of error was awarded.

The first error assigned is to the action of the trial court in appointing commissioners in the cause, based upon the following grounds:

1st. The petition was filed and the motion made by receivers of the Circuit Court of the United States, who had no authority under the statute law of Virginia to institute such proceedings.

2nd. The property sought to be acquired by condemnation was the property of a public service corporation—the Consolidated Turnpike Company—and such property could not be taken by another company, unless after hearing all parties interested, the State Corporation Commission shall certify that a public necessity or that an essential public convenience shall so require, and shall give its permission thereto; and that there was no such hearing or permission.

3rd. The petition did not allege that the land sought to be condemned was necessary for the corporation which the receivers were operating, nor did it allege that they were unable to agree with the owners.

4th. There was no plat or survey of the property sought to be acquired filed with the petition, as required by statute.

5th. The notice served and published did not describe the same property referred to in the petition of the receivers."

We think that the appellant is estopped from relying upon any of the grounds named for a reversal of the order complained of. It not only claims under the proceedings in which the receivers who instituted this proceeding were authorized to institute it, but after its purchase in that case, in order to prevent the appellees from subjecting the deed of trust property in the state court, as they clearly had the right to do but for the condemnation proceedings, it relied upon those proceedings and by means thereof procured the

said injunction from the Federal Court. To permit the appellant afterwards, when the appellees were asserting their rights in the condemnation case, to deny that the receivers who brought that proceeding had authority to institute it, or that their petition instituting it was sufficient, would be in violation of the well settled rule of law, that a litigant will not be allowed in a subsequent judicial proceeding to take a position in conflict with a posi-

tion taken by him in a former judicial proceeding, which latter position is to the prejudice of the adverse party, where the parties are the same and the same questions are involved. *Tatum v. Ballard*, 94 Va., 370; *C. & O. Ry. Co. v. Rison*, 99 Va., 18, 32, and authorities cited; 16 Cyc., 799-800.

After the injunction was granted restraining Taylor, trustee, and Depue from prosecuting their suit to subject the trust property to the payment of the debt secured by the trust deed,

163 Depue notified the plaintiff in error that he would move for a confirmation of the commissioners' report in the condemnation proceeding, or so much thereof as fixed the compensation, etc., for the property at \$57,200. In response to this notice the plaintiff in error appeared and moved the court to vacate and dismiss the condemnation proceeding. This motion was overruled by the court, and its action is the second error assigned.

This assignment of error is based upon the same grounds as is the first assignment of error, and for the same reasons the action of the trial court must be sustained.

The third error assigned is to the action of the court in holding that the appearance of the plaintiff in error was general and not special.

164 An appearance for any other purpose than questioning the jurisdiction of the court—because there was no service of process, or the process was defective, or the service thereof was defective, or the action was commenced in the wrong county, or the like—is general and not special, although accompanied by the claim that the appearance is only special. 3 Cyc., 502; 2 Am. & Eng. Ency. Pl. & Pr., 620, 625-6.

When the plaintiff in error appeared and moved the court to vacate the proceedings had in the cause and to dismiss it, it did so upon grounds which went to the sufficiency of the petition of the receivers. A motion to vacate proceedings in a cause, or to dismiss or discontinue it, because the plaintiff's pleading does not state a cause of action, is equivalent to or analogous to a demurrer and amounts to a general appearance. See 3 Cyc., 506-7; 2 Am. & Eng. Ency. Pl. & Pr., 635-6; *Albert vs. Clarendon & Co.*, 23 Atl. 8.

165 We are of opinion that the plaintiff's appearance was general and that the trial court properly so decided.

One of the grounds upon which the plaintiff in error sought to have the cause dismissed was that the report of the commissioners assessing the compensation, etc., for the property had been filed more than three months without the amount of damages ascertained thereby having been paid to the party entitled or into court.

By Sub-Sec. 27 of Sec. 1105-f of Va. Code, 1904, it is provided that "If in any such proceeding (condemnation) the amount or amounts ascertained by the commissioners as aforesaid be not paid to the party entitled thereto, or into court within three months from the date of the filing of the report of the commissioners, the proceedings shall ipso facto be vacated and dismissed."

More than three months, indeed nearly three years
 166 had elapsed between the filing of the report of
 the commissioners and the motion of the plaintiff
 in error to vacate and dismiss, and the amount ascertained
 by the report had not been paid to the party entitled or
 into court. Sub-Section 27 of Section 1105-f, Va. Code, 1904, had
 been amended by an act approved March 15, 1906, Acts, 1906, pp.
 452, 455, and was in force when said report was filed, though not
 in effect when this proceeding was instituted, or the commissioners
 appointed. The act as amended is as follows: "If in any such pro-
 ceeding the amount or amounts ascertained by the commissioners
 as aforesaid be not paid either to the party entitled thereto or into
 court within three months from the date of the filing of the report
 of the commissioners, the proceedings shall, on motion of the de-
 fendant, be vacated and dismissed as to him, but not otherwise."

Whether or not the amendment was retroactive and applied
 167 to condemnation proceedings commenced before the amend-
 ment was made, it is unnecessary to decide in determining this
 question, for it is clear, we think, that the plaintiff in error is estopped
 from claiming that the condemnation proceeding was ipso facto va-
 cated and dismissed because the amount ascertained by the commis-
 sioners' report was not paid to the party entitled thereto or into court
 within three months after the report of the commissioners was filed,
 after alleging the pendency of the condemnation proceeding long
 after the expiration of the said three months and obtaining an injunc-
 tion upon the ground of its pendency, restraining the defendants in
 error from subjecting the property sought to be condemned to the sat-
 isfaction of the debts secured by the deed of trust. The reasons why

the plaintiff in error is estopped from denying the pendency
 168 of the proceeding are the same as those given in disposing of
 the first assignment of error and need not be repeated.

By the order appointing the commissioners they were directed,
 among other things, to ascertain and report the present value of the
 land to be taken with the present improvements thereon, and also
 its present value without such improvements. Their report on these
 questions for the property to be taken is as follows:

"If valued as of the date of this report, without improvements,
 \$6,200.00 will be a just compensation.

For the land with improvements.....	\$7,200.00
For the steel rails.....	15,000.00
For the railroad ties.....	1,250.00
For the overhead construction.....	2,500.00
For the machinery in the power house.....	25,000.00
For the buildings on tract No. 2.....	5,000.00

Making a total of..... \$57,200.00

will be a just compensation."

The defendants in error moved the court to confirm that
 169 portion of the report which ascertained that \$57,200 would be
 a just compensation for the land to be taken, and the court

sustained that motion and entered an order requiring the plaintiff in error to deposit within three months the said sum of \$57,200, with interest from the date of the order, in some national bank in the city of Norfolk to the credit of the court subject to its future order.

To this action of the court there are two assignments of error:

First, that the court erred in confirming that portion of the report which took into consideration the value of the improvements placed upon the property by the plaintiff in error or its predecessor in title instead of that portion of the report which ascertained the value of the property to be taken without considering the value of the improvements; and, second, in requiring the sum ascertained as just compensation to be deposited in bank to the credit of the court.

170 It is insisted by the appellees that the question involved in the first of these grounds of error has been settled in their favor by the cases of *Newport News, &c., Co. v. Lake*, 105 Va., 311, and *Flanary v. Kane*, 101 Va., 547.

Neither of those cases present precisely the same question involved in this case. In *Newport News, &c., Co. v. Lake*, the premises had been sold under the deed of trust and the purchaser, who was the defendant in the condemnation proceedings, had recovered the premises in an action of ejectment after the improvements had been placed upon the premises by the railway company under authority of the grantor in the deed of trust. It was held that the purchaser, having recovered in the action of ejectment, the premises in fee upon which the railway was laid in its then condition, and all the improvements upon it as a part thereof, the improvements as well as the land being his property his compensation was not limited to the value of the land as it was before the improvements

171 were placed upon it. The other case relied on was not a condemnation proceeding, but a suit to subject the premises upon which the improvements had been placed to the payment of judgments docketed at the time the railway company purchased the land and placed its improvements thereon. But while it was a case in equity, it was held that the principle invoked, that he who asks equity must do equity, did not apply, since the plaintiffs in that case, in coming into equity to enforce their liens, were not asserting an equitable right or seeking equitable relief, and could not be put upon terms. They were asserting legal rights and under the well settled rules of the common law it was held that they were entitled to subject to the payment of their liens, the land with the improvements thereon of which they were a part.

Lewis, in his work on *Eminent Domain*, Vol. 2, Sec. 507 (2nd Ed.), in discussing this question, says:

172 "The question now to be considered is whether in proceedings (condemnation) for this purpose the owner of the land is entitled to the value of the improvements which have been put upon it by the condemning party. If the entry has been made by the consent of the owner, express or implied, it is clear that the owner should not have the value of what has been put upon the land. He has let the condemning party in for the very purpose of

making these improvements and with the expectation that the right permanently to enjoy the land with the improvements would be acquired by agreement or otherwise. The cases all concur upon this point without much discussion of principles. . . . Such consent may be given by the life tenant so as to bind the reversioner, or the mortgagor in possession so as to bind the mortgagee."

- In discussing the question, where the entry has been without the consent of the owner, he asserts that the same rule as to compensation obtains in most jurisdictions, and where it is held otherwise the decisions are placed upon the strict rules of the common law, that a structure placed upon land by a trespasser becomes a part of the realty and cannot be removed. But he says, "the proceeding to ascertain a just compensation to be paid for property taken for public use is not a common law proceeding. The principles to be applied are broad and liberal, and such as are just to both parties. It is a just compensation, no more and no less, which the Constitution requires to be paid. In determining what is just, the courts are not hampered by any hard and fast rules of the common law. As we have already shown, just compensation to the owner is an indemnity for the loss he sustains, irrespective of the general advantages and disadvantages which effect the community at large. Indemnity in the case supposed does not include the value of works prematurely placed upon the property. The owner has not lost the value of such works, but if their value is given to him, it is so much in excess of his loss, which is something never contemplated by the constitution."

So far as this statement applies in condemnation cases to entries made with the consent of the owner, it is sustained by the overwhelming weight of authority. See cases cited in notes to section 507 of Lewis, in notes to *Village of St. Johnsville v. Smith*, 6 Am. & Eng. Ann. Cases, 379, 382-4 (184 N. Y. 341).

- In quoting what Lewis said we do not wish to be understood as approving his statement so far as it applies to entries upon land without authority express or implied. As was said by the Court of Appeals of New York in the case last cited above, where the entry was without authority, "so far as actual intent is concerned, a personal trespasser who annexes a structure to another's freehold does not mean that it shall become the property of the land owner any more than does a trespassing railway company or municipality which does the same thing in contemplation of acquiring the land at some future time by the exercise of the right of eminent domain. The law affixes consequences to the act and not to the intent. It says to those who invoke the power of eminent domain, as well as to all others, 'If you invade land without legal right and place structures thereon, those structures belong to the land owner. There is no more hardship in applying the rule to the one class of trespassers than to the other. In both cases the application tends to prevent a wrong. Its operation in this State has been and will doubtless continue to be most salutary in

176 constraining those municipal and other corporations which the State has authorized to exercise the power of eminent domain not to assume the possession of lands in advance of any right so to do, and thus practically nullify, during the period of wrongful possession that provision of the Constitution which guarantees the citizen against being deprived of his property for public use without just compensation."

Where the possession of the party seeking to condemn is lawful, Lewis's statement, that in ascertaining just compensation the improvements placed upon the premises by it are not to be included, is not only sustained by the great weight of authority but by the better reason. In a controversy between the land owner and the condemning party, the former cannot in justice claim the value of the land in its improved condition when the improvements were made with his consent. Neither can a mortgagee or deed

177 of trust creditor, in granting permission to the condemning party to enter upon the premises and place his improvements upon them, — the land owner has not prejudiced the mortgagee or trust creditor. It is not pretended that such act has lessened the security, but it is admitted that it has increased the value, and the claim of the deed of trust creditor is that he is entitled to have the benefit of this increase, not because in justice and equity he is entitled to it, but because under the strict rules of the common law all structures placed upon the property subject to his lien enures to his benefit.

We are of opinion that where a corporation, clothed with the power of eminent domain, lawfully enters into the possession of land for its purposes, and places improvements thereon, and afterwards institutes condemnation proceedings to cure a defective title, or to extinguish the lien of a deed of trust, it is not proper in
178 ascertaining "just compensation" for such land to take into consideration the value of such improvements.

The commissioners in their report ascertained the value of the land, as of the date of their report, without considering the improvements, at \$6,200. This sum we think should have been fixed as the just compensation for the land taken, and that the trial court erred in not so holding.

The other ground upon which this assignment of errors is based is the action of the court in requiring the plaintiff in error within three months to pay the sum ascertained, as just compensation into some National bank in the city of Norfolk.

The Code, sec. 1105-f, sub-sections 9 to 13, provides how payment is to be made for lands taken in condemnation proceedings. If the condemning company is not in possession when the report ascertaining a just compensation is confirmed, it can only require title
179 to or the right of possession of the land so condemned by paying such sum into court or to the party entitled. If such company is in possession of the land when the report of the commissioners is confirmed, as it may be where there has been a prior report which was not confirmed, and the confirmed report increases the compensation over that ascertained by the former report, the condemning

company has thereafter no right to the possession until full payment has been made into court or to the party entitled.

Mr. Lewis, in his work on Eminent Domain, in discussing the character of the judgment to be entered in condemnation cases, says "If the statute is so far silent upon the subject as to leave the matter open for judicial construction, then the proper judgment to be entered will depend upon the following considerations: If possession has already been taken of the property, either by consent or otherwise or if the property has already been taken by virtue of an instrument of appropriation, as it may be in some States, before the compensation is paid, then a personal judgment with all its incidents may properly be entered."

Our statute does not expressly provide for such a case as we are now considering. In neither of the classes of cases provided for, whether the condemning party is in or out of possession, is there any authority conferred upon the court to enter a personal judgment. The reason for this may be in the fact that in the absence of statutory provisions on the subject, it is generally held that the effect of condemnation proceedings is simply to fix the price at which the party condemning can take the property sought, and that even after confirmation of the report fixing such price the purpose of taking such property may be abandoned without incurring any liability to pay the damages awarded. See Lewis, sec. 656 and cases cited. Whatever be the reason of our law-making power for not authorizing a personal judgment in the class of cases provided for, we find no authority in the statute for entering a personal judgment in this case, and to do so would seem to be contrary to the principle upon which our statute was framed. Whatever be the effect of the amendment of March 15th, 1906, heretofore quoted, as to the right of a party to abandon or discontinue condemnation proceedings instituted by it, it cannot affect this case for it is well settled, "that although the words of a statute are broad enough in their literal extent to comprehend existing cases, they must be construed as applicable to cases that may thereafter arise, unless a contrary intention is unequivocally expressed therein." *Campbell & Co. v. Nonparell, &c.*, 75 Va. 291, 298; *Price & Co. v. Harrison*, 31 Gratt. 114. There is nothing in that amendment which shows that it was intended to have any retroactive effect.

As to the remaining assignment of error, that the report of the commissioners is not in accord with the order and direction of the court in appointing them, it is sufficient to say that no such objection was made to the report in the lower court.

We are of opinion to reverse the judgment or order complained of, and to enter such judgment as the trial court ought to have entered.

Reversed.

A copy.

Teste:

J. M. KELLY, C. C.

183 VIRGINIA:

In the Clerk's Office of the Supreme Court of Appeals in the Library Building in the City of Richmond, on the 18th day of June 1910. The following copy of an order of this court, entered at its place of session at Wytheville was this day received by the clerk here:

"VIRGINIA:

"In the Supreme Court of Appeals Held at the Courthouse of Wythe County, in the Town of Wytheville, on Friday, the 10th Day of June, 1910.

NORFOLK AND OCEAN VIEW RAILWAY COMPANY Appellant,
against

B. W. LEIGH and J. A. C. GRONER, Receivers of The Bay Shore Terminal Company, and Norfolk and Ocean View Railway Company, the Purchasers of the Bay Shore Terminal Company; The Consolidated Turnpike Company, Walter H. Taylor, Trustee, and Arthur Dupue, Appellees.

Upon an Appeal from and Supersedes to a Decree Pronounced by the Circuit Court of Norfolk County on the 6th Day of August, 1909.

"This cause, which is pending in this court at its place of session at Richmond, having been fully heard but not determined at said place of session; this day came here the parties by counsel, and the court having maturely considered the transcript of record of the decree aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said circuit court erred in confirming that portion of the report of the commissioners awarding to the appellees damages for the entire value of the land to be taken with the present improvements thereon, and in not confirming the report of the commissioners awarding damages to the appellees for the value of the land to be taken exclusive of the improvements thereon, as of the date of their report. It is, therefore, considered that the judgment of the circuit court be reversed and annulled, and this court proceeding to enter such judgment as the said circuit court ought to have entered it is adjudged and ordered that that part of the commissioners' report which awards the sum of Fifty Seven Thousand Two hundred dollars (\$57,200.00) as a just compensation for the land of the appellees to be taken, be and the same is, set aside and annulled, and that part of said report which awards to the appellees the sum of six thousand two hundred dollars (\$6,200) as a just compensation for the land to be taken, exclusive of the improvements, be and the same is hereby confirmed.

And it is further adjudged and ordered that upon payment into the circuit court of Norfolk county, or to the parties entitled thereto, by the Norfolk and Ocean View Railway Company, or some one for it, of the sum of six thousand two hundred dollars (\$6,200.00),

with interest from the 6th day of August, 1909, and the costs of this proceeding in the circuit court, title to the land and interest described in the commissioners' report filed on the 29th day of June, 1906, shall be vested in the said Norfolk and Ocean View Railway Company in fee simple; and it is further ordered that the cause be remanded to the said circuit court of Norfolk County for further proceedings to be had therein according to law.

And it is further ordered that the appellant recover of the appellees its costs by it expended about the prosecution of its appeal and supersedens aforesaid here. Which is ordered to be entered in the order book here and forthwith certified, together with a certified copy of the opinion in this case, to the clerk of this court at Richmond, who will enter this order in the order book there and certify it to the said circuit court of Norfolk county.

A copy.

Teste: J. M. KELLY, C. C.

Teste: H. STEWART JONES, C. C.

A Copy.

Teste:

H. STEWART JONES, C. C.

185 In the Supreme Court of Appeals of Virginia, at Richmond.

NORFOLK & OCEAN VIEW RAILWAY COMPANY

VS.

CONSOLIDATED TURNPIKE COMPANY et al.

Petition for Rehearing.

Charles H. Burr, Nathaniel T. Green, Attorneys for Appellees.

Filed Sep. 5, 1910.

A. W. MAY, Clerk.

186 In the Supreme Court of Appeals of Virginia, at Wytheville.

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

Your petitioners, Arthur W. Depue and Walter H. Taylor, Trustee, respectfully represent that they are aggrieved by a decision of this court made on Thursday, the 9th day of June, 1910, in the case pending in the aforesaid court under the style of Norfolk & Ocean View Railway Company vs. Consolidated Turnpike Company et al. (wherein your petitioners were of appellees), and by a judgment of the Court entered in pursuance of said decision.

One of the grounds of this petition is that in the opinion delivered in said case by this Honorable Court, it has overlooked one of the chief facts in the case, and applied in its decision a principle of law which that fact makes inapplicable to the case.

In its opinion the Court, as the chief authority for its judgment, cites the following from Lewis on Eminent Domain:

"Persons and corporations vested with the power of eminent domain have no more right than natural persons to enter upon private property before taking the steps prescribed by law to obtain possession. If they do, the owner may have his common law remedies of trespass or ejectment, or he may resort to equity and enjoin the invasion or use of his land. But in all such cases the persons making the entry may, by proper proceedings, condemn the property entered upon, and so perfect their right to its possession

187 and enjoyment. The question now to be considered is whether in proceedings for this purpose the owner of the land is entitled to the value of the improvements which have been put upon it by the party condemning it. If the entry has been made by consent of the owner, express or implied, it is clear that the owner should not have the value of what has been put on the land. He has let the condemning party in for the very purpose of making these improvements, and with the expectation that the right permanently to enjoy the land with the improvements, would be acquired by agreement or otherwise. The cases all agree upon this point, without much discussion of principles. In such cases the award includes all damages from the entry. Such consent may be given by the life tenant, so as to bind the reversioner, or by the mortgagor in possession, so as to bind the mortgagee. If the owner brings a suit to recover the just compensation, such a suit operates as a consent to the occupation, which relates back to the entry, and upon the principles above cited the value of the works put upon the property must be excluded in estimating the damages.

"When the entry is made without consent, express or implied, the case presents more difficulties, but it seems clear, both upon reason and authority, that the owner, in a proceeding to ascertain the just compensation, is not entitled to the value of works placed upon the property, though without right, for the purpose of adapting the property to the public use intended. The few cases which hold to the contrary proceed upon a strict and technical application of the rule of common law, that structures placed upon the land by a trespasser become a part of the realty and cannot be recovered. In a common law proceeding this rule of law would perhaps apply, but the proceedings to ascertain the just compensation to be made for property taken for public use is not a common law proceeding."

And the Court also relies on *St. Johnsbury, etc., Railroad Co. vs. Willard*, 61 Vermont, 134, 2d L. R. A. 528, which is the pioneer case in the principle of law applied by the Court to this case, and one upon which most all the other authorities rely.

188 If there were nothing in this case which distinguishes it from these authorities, we could be complacent under the distinction made by the Court between the case at bar and the cases of *Newport News, etc., Co. vs. Lake*, 105 Va. 311, and *Flannery vs. Kane*, 102 Va. 548, but as in our view there is an all important fact in this case which makes the authority of Lewis and the Vermont case inapplicable, we feel impelled, in justice to our-

selves and to the Court itself, to bring it to the attention of the Judges.

It may be universally true that when a corporation possessing the power of eminent domain at the time enters upon land subject to a mortgage under a purchase from a mortgagor, the benefit of the improvements made by such a corporation are not to be considered as belonging to the mortgagee in eminent domain proceedings thereafter instituted by the corporation to obtain the mortgagee's interest; and yet this principle would not be applicable to the case at bar. This will be perfectly plain when we consider the reason for the principle above stated. There can be but one reason for such a principle, viz.: That the corporation at the time it entered possessed the power of eminent domain and could have taken the property at that time, and is therefore not to be confused with an ordinary purchaser who did not possess the power of eminent domain, and could not have taken the property at the time of entry. This is the only difference either in facts or principle between an ordinary purchaser and such a corporation, and can therefore be the only basis for the distinction.

In the present case when the Bay Shore Terminal Company bought under this mortgage it did not at that time have the power of eminent domain as to this property, inasmuch as no corporation could then take the property of another corporation possessing the power of eminent domain. It stood in relation to the same precisely as any other purchaser, and the improvements made by it inured to the benefit of the mortgagee the instant they were made, just as if they were made by any other purchaser, and it is to be noted that these improvements were made by it to this property long before it possessed the power of eminent domain relative thereto, for it must be remembered that the statute which gave the company power to take this property was enacted long after these improvements were made and this purchase concluded. Prior to its enactment no such power existed.

Suppose A and B, being individuals without the power of eminent domain, had purchased the property in question from the mortgagor and had placed on it the very same improvements. It cannot be doubted that the minute those improvements were made by A and B they would inure to the benefit of the mortgagee. Suppose A and B thereafter incorporated themselves under a statute subsequently enacted into a corporation possessing the power of eminent domain and instituted condemnation proceedings to obtain the mortgagee's interest, it is submitted that this would not take away from the mortgagee the value of the improvements and transfer it to the corporation simply because A and B had chosen to be incorporated under such subsequent statute and had instituted condemnation proceedings in the name of the corporation. To hold this would be to deprive the mortgagee of his property without due process of law; in other words, A and B could not take what would belong to the mortgagee, and what inured to his benefit from the moment that they were erected, by the simple process of having

themselves incorporated under a subsequent statute, into a corporation with the power of eminent domain.

It is not, therefore, the nature of the proceedings that is before the Court which becomes the basis for the principle stated in *Lewis on Eminent Domain*, but it is the fact that the purchaser at the time of entry had the power of eminent domain as to the property and could have taken it, had it so desired, from the owners *volens*. To make this clear:

190 When a corporation, possessing at the time the power of eminent domain, purchases from a mortgagor and makes improvements, in law (as stated by *Lewis*) those improvements never become the property of, or inure to the benefit of the mortgagee, and therefore when the corporation comes to condemn the property of the mortgagee, and as said improvements never belonged to the mortgagee, of course the corporation would not (under *Lewis's* principle) have to make "just compensation" therefor, and for the simple reason that the improvements never belonged or inured to the benefit of the mortgagee.

On the other hand, when a corporation not possessing the power of eminent domain at the time purchases property subject to a mortgage from the mortgagor, the improvements made by it belong to and inure *eo instanti*, from the time they are made, to the mortgagee, and "just compensation" must be made therefor; and this is true, because the improvements in this last case belong to the mortgagee.

In the one case, the improvements under the law did not belong to the mortgagee, and no compensation must be made therefor. In the other case, they did belong to the mortgagee and compensation must be made therefor.

In other words, the law first determines what a man owns, and then, under eminent domain proceedings, "just compensation" must be made for what he owns. If he does not own it, of course he gets no compensation therefor.

It is perfectly plain, that as a natural premise, and as the first step in determining what is "just compensation," what belongs to the person whose property is sought to be taken, must first be ascertained. It cannot be that the mere form which proceedings take will result in the one case in declaring that a person is not the owner of certain improvements, when in the other case he is considered the owner of such improvements.

It is true, that sometimes in equity the plaintiff is re-
191 quired, as a condition to equitable relief, to surrender some of his legal rights under the principle that "he who asks equity must do equity"; but in all such cases it is the plaintiff who is put upon terms, and it is he from whom legal rights are taken, that determines the nature and form of the action, and not the opposing party.

Any other view than that outlined herein above would result in an inequality in the law between individuals and corporations, and the question comes down at last to this:

Can what belongs to a man under the law be taken away from

him by a simple legal enactment, which gives to a collection of persons, as to his property, a certain right which they did not before possess?

It is a well settled principle of constitutional law, it is true, that remedies may be changed, but no remedy can be so changed as to utterly destroy the vested rights of a person, or to impair the obligations of a contract.

It is plain from the record in this case and is a consensum that the Bay Shore Terminal Company did not have the power to take this property under eminent domain proceedings at the time it entered thereon under a purchase from the mortgagor, which itself had the right of eminent domain; it is also plain that these improvements were made on this property long before it possessed the power of eminent domain relative thereto; it is equally as clear that the instant those improvements were made they inured to and vested in the mortgagee, and being his property, it follows as the night the day that the power of eminent domain, thereafter given the Bay Shore Terminal Company, could not in justice, in equity, in law, reason or logic, take away from him that which was his and confer it upon the corporation. It is no answer to this to state that the public is interested in the question as shown by conferring the power of eminent domain, because our constitution provides that the public itself cannot take away any man's property without making "just compensation" therefor. The property in this case belonged to the mortgagee and no legislative act or change in the form of procedure, or power of eminent domain conferred on an aggregation of individuals, can deprive him of his property without an equivalent therefor.

It should be carefully remembered also that there is not a single case or authority in which the principle of Lewis is applied where the corporation did not possess the power of eminent domain as to the property involved at the time it entered thereon, and this itself is a strong argument for the position that Lewis's principle would not apply where at the time of the entry the corporation did not possess such power.

The case of Price vs. Weehawken Ferry Company, 31 N. J. Equity 31 (a case from a State wherein the principle laid down by Lewis is applied), is direct authority upon this point:

In that case a railroad company (not having the power of eminent domain) entered upon the land under a mortgage under a grant of right of way from the mortgagor after the mortgagee's mortgage had been recorded. The mortgagee sought to foreclose the mortgage and the question before the Court was whether the superstructure of the railroad was subject to the mortgage or should be reserved from the foreclosure sale. The Court held that it passed to the mortgagee and was subject to the mortgage. The Court says:

"Nor is the right to the equity claimed established by the mere fact that the mortgagee knew that the road was being constructed over mortgaged premises. There is no paramount power of condemnation here as there was in the case of North Hudson County R. R. Co. vs. Booraem, 1 Stew. 450, no power (the right of eminent do-

main) to take the property, superior to the rights of both mortgagor and mortgagee. The power of eminent domain confers the right to take the property on making just compensation, and that compensation, in such case, is, so far as the value of the land is concerned, to be estimated as of the time when possession was taken, and therefore cannot include the value of improvements subsequently put upon the property by the party entering under the right. But where, as in this case, the entry was not under that right, the right to take the property on compensation does not exist, and the party entering and improving does both subject to the right of the mortgagee whose mortgage was on the property, to sell, for the payment of his debt, the land and the permanent improvements incorporated with it. In the one case, the maxim 'Quicquid plantatur solo, solo cedit' is not applicable; in the other it is."

And that this distinction is proper is shown by the leading case of *St. Johnsbury, etc., Co. vs. Willard*, supra, cited in the opinion of this Court, wherein the same distinction is recognized in these words:

"The improvements in question were made for a public use by one lawfully in possession with the right to condemn to such use at any time; and herein lies the distinction between this case and *Price vs. Weehawken Ferry Co.*, 31 N. J. Eq. 31, relied upon by the defendant. In that case the company had no right to take the land on compensation; and the court said that therefore the maxim above referred to applied, but said it does not apply when the right to take exists. *N. Hudson Co. R. R. Co. vs. Booraem*, 28 N. J. Eq. 454; *Chief Justice vs. Nesquehoning Valley R. R. Co.* 87 Pa. 28, and *Jones vs. N. O. & S. R. Co.*, 70 Ala. 227."

II.

It is further urged that the fact that the Terminal Company had no right of eminent domain over the property of the Turnpike Company when the improvements were erected, renders any taking under a subsequent statute of the rights of the appellees theretofore acquired, a taking without due process of law in violation not only of the Constitution of Virginia, but of the Fourteenth Amendment to the Constitution of the United States. The statement of the facts is the strongest argument. Before the passage of the present condemnation act, the improvements had become subject to the mortgage lien of the appellees; after the passage of the statute, and by its authority, appellants took the property with the improvements. If they do not pay for the improvements so taken, then they take property without due process of law. The Fourteenth Amendment has been construed as applicable to condemnation cases and is directly in point here. *Chicago & Quincy R. R. vs. Chicago*, 166 U. S. 226.

III.

The history of this case and the state of the record justify counsel, it is respectfully submitted, in suggesting to the Court that in any

event the case should be sent back for further proceedings in the Court below. The decision there being wholly in favor of appellees there was no opportunity for appellees to be heard respecting the insufficiency of the alternative award of \$6,200 when \$25,000 was agreed to be the proper price for the land at the time, and appellees should not be deprived of that privilege, in view of the novel and peculiar conditions created by an alternative award in condemnation proceedings. Again, the decision of the lower Court left no opportunity to raise the question of Federal Constitutional Law except merely *arguendo*. An opportunity to present this question is now prayed. But should it be denied, the Court is respectfully prayed to preserve in this regard the rights of the appellees, who have had no opportunity by assignments of error to raise the Constitutional question, and to render an opinion on this petition for rehearing. This practice was followed in *Mallett vs. North Carolina*, 181 U. S. 589.

Your petitioners pray for the above reasons that the judgment and decision above complained of may be reheard and that they may be given a further opportunity through their counsel of arguing the case.

Respectfully submitted,

WALTER H. TAYLOR, *Trustee*,
ARTHUR W. DEPUE.

By Counsel.

NATHANIEL T. GREEN.
CHARLES H. BURR.

195 I, Nathaniel T. Green, an attorney, practicing in the Supreme Court of Appeals of Virginia, do hereby certify that in my opinion the judgment complained of in the foregoing petition is erroneous and should be reheard.

Given under my hand this sixteenth day of June, 1910.

NATHANIEL T. GREEN.

196 VIRGINIA:

In the Supreme Court of Appeals, Held at the Court House Thereof, in the City of Staunton, on Tuesday, the 6th Day of September, 1910.

NORFOLK AND OCEAN VIEW RAILWAY COMPANY, Appellant,
against

CONSOLIDATED TURNPIKE COMPANY, Appellee.

Upon a Petition for Rehearing.

This day came the appellee by counsel and moved the court to set aside the decree entered by this court in this cause at its place of session at Wytheville, on the 9th day of June, 1910, and grant a re-hearing thereof; but because the court here is not yet advised of

the order to be entered in the premises, time is taken to consider thereof.

A copy.

Teste:

ALEX. W. MAY, *Clerk.*

197 VIRGINIA:

In the Supreme Court of Appeals, Held at the Court House Thereof, in the City of Staunton, on Wednesday, the 14th Day of September, 1910.

NORFOLK AND OCEAN VIEW RAILWAY COMPANY, Appellant,
against
CONSOLIDATED TURNPIKE COMPANY, Appellee.

Upon the petition of the Appellee, by counsel, for a rehearing of the decree entered by this court in this cause at its place of session at Wytheville, on the 9th day of June, 1910.

This day came again the Appellant, by counsel, and the court having maturely considered the petition aforesaid, the same is denied.

Teste:

ALEX. W. MAY, *Clerk.*

198 In the Supreme Court of Appeals of Virginia.

NORFOLK & OCEAN VIEW RAILWAY COMPANY, Plaintiff in Error,
versus
CONSOLIDATED TURNPIKE COMPANY et al., Defendants in Error.

And Now, To-wit, October 14th, 1910, on motion of the defendants in error, Consolidated Turnpike Company, Walter H. Taylor, Trustee, and Arthur W. Depue, this Court orders it to be certified and made part of the record in this case, and the Honorable James Keith, President Judge of said Supreme Court of Appeals does now certify that in said cause, in the petition of Arthur W. Depue and Walter H. Taylor, Trustee of defendants in error, for a re-hearing thereof, it was claimed, contended and alleged by the said petitioners that the decision or judgment of this Court rendered after the hearing in said cause whereby this Court reversed the decision or verdict of the Circuit Court of Norfolk County in favor of the said defendants in error for \$57,200 the full value of the land for the condemnation of which this action was originally brought, and improvements placed thereon by the Norfolk & Ocean View Railway Company, the plaintiff in error, and their predecessors in title, the Bay Shore Terminal Company, and awarded to said defendants in error only the sum of \$6,200 as the value of the land alone, without the improvements, was a taking of said defendants' property without due process of law, in violation of the 14th Amendment to the Constitution of the United States, because the fact that the Bay Shore Terminal Company, the predecessor in title of the plaintiffs in error,

199 had no right of eminent domain when the improvements were erected, rendered any taking under a subsequent Statute of the property rights of the defendants' in error, a taking without due process of law, and because the decision of the lower Court having been wholly in favor of the defendants in error they had no opportunity to be heard respecting the insufficiency of the award for the land without the improvements, which award was made by this Court; that this Court refused the said petition for a rehearing on the ground inter alia that the decree or decision of this Court made as above set forth did not constitute a taking of the property of the defendants in error without due process of law, in violation of the 14th Amendment to the Constitution of the United States, and that the said defendants in error were not thereby deprived of any rights under said Amendment to said Constitution.

JAMES KEITH,

President Supreme Court of Appeals of Virginia.

200 [Endorsed:] In the Supreme Court of Appeals of Virginia.
Norfolk & Ocean View Railway Company vs. Consolidated
Turnpike Company et al. Order. W. T. Green, Chas. H. Burr.

201 . In the United States Supreme Court.

CONSOLIDATED TURNPIKE COMPANY et al., Plaintiffs in Error,
versus
NORFOLK & OCEAN VIEW RAILWAY COMPANY, Defendant in Error.

Assignments of Error.

And Now come Consolidated Turnpike Company, Walter H. Taylor, Trustee, and Arthur W. Depue, plaintiffs in error, and make and file this their assignment of errors.

1. The Supreme Court of Appeals of the State of Virginia erred in reversing the judgment or decree of the Circuit Court of Norfolk County, Virginia, in favor of plaintiffs in error, for the reason that by so doing they authorized the taking of the property of plaintiffs in error without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

2. The said Supreme Court of Appeals of the State of Virginia erred in directing an award to the plaintiffs in error of only the value of the land, the condemnation of which is sought by this action, and not of the land with the improvements thereon erected, for the same reason.

N. T. GREEN,

B., AND

CHARLES H. BURR,

Attorneys for Plaintiffs in Error.

202 [Endorsed:] In the Supreme Court of the United States.
Consolidated Turnpike Company et al., Plaintiffs in Error,
vs. Norfolk & Ocean View Railway Company, Defendant in Error.
Assignments of Error. N. T. Green, Chas. H. Burr.

203 In the Supreme Court of Appeals of Virginia.

CONSOLIDATED TURNPIKE COMPANY et al., Plaintiffs in Error,
versus
NORFOLK & OCEAN VIEW RAILWAY COMPANY, Defendant in Error.

To the Honorable James Keith, Chief Justice of the Supreme Court of Appeals of Virginia:

Your petitioners, Arthur W. Depue and Walter H. Taylor, Trustees, as hereinafter set forth, who are residents of the City of Norfolk, in the State of Virginia, respectfully show:

1. That on or about the 3rd day of March, 1906, an action for condemnation of land was commenced in the Circuit Court of the State of Virginia for the County of Norfolk by B. W. Leigh and J. A. C. Groner, Receivers of the Bay Shore Terminal Company, a corporation created by and existing under and by virtue of the laws of the State of Virginia and a citizen thereof (said Receivers having been duly appointed in the case of Charles E. Fink vs. Bay Shore Terminal Company, et al., then pending in the Circuit Court of the United States for the Eastern District of Virginia), to condemn an interest in land constituting a part of the highway of the Consolidated Turnpike Company, a corporation created by and existing under and by virtue of the laws of the State of Virginia.

2. The material facts which are essential in arriving at a decision in this cause are set forth in historical sequence as follows:

204 In 1900 there existed a turnpike running from Norfolk to Ocean View. This turnpike was one of the constituent turnpikes of the Consolidated Turnpike Company, and was subject to two mortgages, one for \$25,000 to Walter H. Taylor, Trustee, and another, inferior in lien, for \$200,000, to Walter H. Taylor, Trustee. This last mortgage covered turnpikes other than the one in question.

In 1900 the Bay Shore Terminal Company was formed, to erect an electric trolley line on a portion of this turnpike.

In 1902 a Deed was obtained from the Consolidated Turnpike Company to the Bay Shore Terminal Company for this right of way. Said Deed recited the existence of the aforementioned mortgages upon the premises conveyed.

In 1904, after the erection of the trolley line as above set forth, the present condemnation Act of the State of Virginia was passed by the Legislature.

In 1903, the Bay Shore Terminal Company became insolvent and Receivers were appointed by the Circuit Court of the United States for the Eastern District of Virginia, in the suit of Fink vs. Bay Shore Terminal Company.

In January, 1906, by order of the United States Circuit Court, the Receivers were instructed to institute condemnation proceedings for the purpose of acquiring title to the property on which the said electric railway ran, clear of all encumbrances.

On March 3rd, 1906, this action of condemnation was begun in the appropriate State Court of Virginia.

On March 17th, 1906, a decree of foreclosure of the property of the Bay Shore Terminal Company was entered.

On June 29th, 1906, the Commissioners appointed in the Condemnation proceedings made an alternate report showing (a) the value of the land alone without improvements to be \$6,200, 205 and (b) the value of the land with the improvements erected at the time of the commencement of the condemnation proceedings to be \$57,200.

On February 7th, 1907, a sale had under the said decree was confirmed, and the purchaser, the Norfolk & Ocean View Railway Company, a corporation created by and existing under and by virtue of the laws of the State of Virginia, defendant in error, received a conveyance of the property purchased "with the benefit of and subject to all suits or proceedings which may have been or may be instituted by the said receivers."

In March, 1907, a foreclosure suit was instituted to foreclose the aforesaid mortgage created by the Consolidated Turnpike Company, in a suit had in the appropriate State Court.

On September 27th, 1907, upon supplementary bill filed in the United States Circuit Court for the Eastern District of Virginia, in the above named case of Fink vs. Bay Shore Terminal Company, a preliminary injunction was granted enjoining your petitioners Walter H. Taylor, Trustee, Arthur W. Depue, and the Consolidated Turnpike Company from "prosecuting any suit against the Consolidated Turnpike Company so far as the same affects the title or ownership of the property conveyed by the commissioners of this court to the said petitioner in above entitled suit or from doing any act or thing affecting the possession, use and enjoyment by the said Norfolk & Ocean View Railway Company of that certain parcel of land between Norfolk and Ocean View occupied by said company as its right of way, being the same land which was conveyed to the said company by the commissioners of this Court under decree in this cause of the 17th day of February, 1907."

In January 1908 the issuance of this injunction was sustained by the Circuit Court of Appeals, on the ground that the purchasers at the sale were entitled to protection at the hands of the Circuit Court from any interference until the condemnation 206 proceedings begun under the order of that Court were completed.

Shortly thereafter, your petitioners Arthur W. Depue and Walter H. Taylor, Trustee, moved the Court in which the Condemnation proceedings were pending for the confirmation of the award made by the commissioners. Defendant in error, the Norfolk & Ocean View Railway Company, appeared and moved the court to dismiss the proceedings.

On August 6th, 1909, the Court entered an order confirming the award of \$57,200 as the value of the property at the time of the commencement of the condemnation proceedings.

The Norfolk & Ocean View Railway Company, defendant in error, appealed from this award to the Supreme Court of Appeals of the State of Virginia, and assigned numerous assignments of error to the effect that they had a right to discontinue the condemnation proceedings; that the condemnation proceedings contained irregularities; and finally that the damages were excessive.

The Supreme Court of Appeals sustained the contentions of your petitioners Arthur W. Depue and Walter H. Taylor, Trustee, in all particulars save one, namely, the said Court held that the correct measure of damages was the value of the property at the time of the conveyance in 1902 by the Consolidated Turnpike Company to the Bay Shore Terminal Company (the predecessor in title of the defendant in error, the Norfolk & Ocean View Railway Company).

The Supreme Court of Appeals thereupon entered a new judgment reversing the judgment of the lower Court, adopting and confirming the alternate award made by the Commissioners.

Your petitioners, Arthur W. Depue and Walter H. Taylor, Trustee, acting by their counsel, thereupon filed in the Supreme

207 Court of Appeals a petition for re-hearing, setting forth substantially the above state of facts, and particularly claimed that there was denied to your petitioners by the new judgment entered by the Court as aforesaid a title, right, privilege and immunity held by your petitioners under the 14th Amendment to the Constitution of the United States, in that to take the property, the title to which had vested in your petitioners prior to the passage of the Condemnation Act of January 18, 1904, or of the Act of May 21, 1903, without paying for said property was a deprivation of the property of your petitioners without due process of law.

On September 14th, 1910, the said petition for a re-hearing was denied.

Your petitioners, Arthur W. Depue and Walter H. Taylor, Trustees, show that the title to the improvements placed upon the moved premises securing the issue of bonds vested in your petitioners eo instanti with the erection of such improvements. They further show that the conveyance by the mortgagor Consolidated Turnpike Company to the Bay Shore Terminal Company recognized the lien of said mortgage. They further show that under the Statute law and decisions of the State of Virginia, the Consolidated Turnpike Company was a corporation clothed with the power of eminent domain at the time of the erection of said improvements. They further show that under the Constitution and laws of the State of Virginia, at the time of the erection of said improvements no right of condemnation of the property of a corporation clothed with the power of eminent domain existed. They further show that this power was given by the Condemnation Act of January 18, 1904, of the State of Virginia, and by § 52 of Chapter V of the Act of May 21, 1903. Your petitioners further show that the Supreme Court of Appeals of the State of Virginia, is the highest Court in the said State. Under this Condemnation Act of January 18, 1904, the proceedings in this cause were instituted.

208 Your petitioners are advised by counsel, believe and therefore aver that to take the property of your petitioners vested in them as aforesaid without any compensation therefor by and under the authority of said Act adopted after the vesting of said property in your petitioners as aforesaid is to take the property of your petitioners without due process of law, contrary to the 14th Amendment to the Constitution of the United States.

Your petitioners further show unto your Honorable Court that they have had no opportunity of directly raising on the record, except by the petition for re-hearing aforesaid, the constitutional question above named, in that the entry of the alternate award by the Court of Appeals without opportunity to except to the constitutionality of the same renders the said petition for re-hearing the only method by which the said constitutional question could be raised upon the said record.

Wherefore your petitioners pray that a writ of error may issue and that they may be allowed to bring up for review before the Supreme Court of the United States, the said order and judgment of said Supreme Court of Appeals of the State of Virginia; and that your petitioners may have such other and further relief in the premises as may be just; and your petitioners will ever pray, etc.

ARTHUR W. DEPUE,
WALTER H. TAYLOR,

By Counsel.

N. T. GREEN,
B.,
CHARLES H. BURR,
Attorneys for Petitioners.

209 STATE OF VIRGINIA,
County of Norfolk, ss:

Arthur W. Depue, being duly sworn according to law deposes and says: that he is one of the petitioners named in the foregoing petition, and that the facts set forth in the said petition, so far as they are stated upon his own knowledge are true, and so far as they are stated on information and belief, he believes them to be true.

ARTHUR W. DEPUE.

Sworn to and subscribed before me, this 5th day of October, A. D. 1910.

SALLIE E. STEED,
Notary Public.

My commission expires Aug. 18, 1913.

STATE OF VIRGINIA,
Supreme Court of Appeals:

Let the writ of error issue upon the execution of a bond by Arthur W. Depue and Walter H. Taylor, Trustee, to the Norfolk & Ocean

View Railway Company, a corporation, in the sum of One thousand Dollars, said bond when approved to act as a supersedeas.

Dated this 14th day of October, 1910.

JAMES KEITH,
*President of the Supreme Court of Appeals
of the State of Virginia.*

210 [Endorsed:] In the Supreme Court of Appeals of Virginia. Consolidated Turnpike Company et al., Plaintiffs in Error, vs. Norfolk & Ocean View Railway Company, Defendant in Error. Petition for Writ of Error to the Supreme Court of the United States. N. T. Green, Chas. H. Burr.

211 Copy.

Know all Men by these Presents, That we, Arthur W. Depue and Walter H. Taylor, Trustee, as principal, and American Surety Company of New York, as sureties, are held and firmly bound unto The Norfolk and Ocean View Railway Company in the full and just sum of One Thousand Dollars to be paid to the said Norfolk and Ocean View Railway Company certain attorney, executors, administrators, or assigns: to which payment well and truly to be made. we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this fourteenth day of October in the year of our Lord one thousand nine hundred and ten.

Whereas, lately at a session of the Supreme Court of Appeals of Virginia in a suit depending in said Court, between Norfolk and Ocean View Railway Co. and Consolidated Turnpike Co. Arthur W. Depue and Walter H. Taylor, Trustee, a judgment was rendered in certain condemnation proceedings, adverse to the claims and contentions of the said Arthur W. Depue and Walter H. Taylor, Trustee, and the said Arthur W. Depue and Walter H. Taylor, Trustee, having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Norfolk and Ocean View Railway Company citing and admonishing it to be and appear before the United States Supreme Court, to be holden at the city of Washington, within thirty days.

Now, the condition of the above obligation is such, That if the said Arthur W. Depue and Walter H. Taylor, Trustee shall prosecute the writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

ARTHUR W. DEPUÉ,
By CHAS. H. BURR, *Att'y.* [L. s.]
WALTER H. TAYLOR, *Trustee,*
By CHAS. H. BURR, *Att'y.* [L. s.]

[Seal American Surety Company of New York.]

AMERICAN SURETY COMPANY OF
NEW YORK,
By GEO. U. SKIPWITH, *Agent.* [L. s.]

Sealed and delivered in the presence of—

H. STEWART JONES.

Approved by—

JAMES KEITH,

President Supreme Court of Appeals of Va.

212 UNITED STATES OF AMERICA, *vs.*

The President of the United States to the Honorable the Judges of the Supreme Court of Appeals of the State of Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Appeals of the State of Virginia, before you, or some of you being the highest court of law or equity of the said state in which a decision could be had in the said suit between Norfolk & Ocean View Railway Company and Consolidated Turnpike Company, Arthur W. Depue and Walter H. Taylor, Trustee, wherein was drawn in question the construction of a clause of the Constitution of the United States and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said Constitution a manifest error hath happened, to the great damage of the said Consolidated Turnpike Company, Arthur W. Depue and Walter H. Taylor, Trustee, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 12th day of November next, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable John M. Harlan, Senior Justice of the Supreme Court of the United States, the 14th day of October in the year of our Lord one thousand nine hundred and ten.

[Seal United States Circuit Court, Eastern District of Virginia.]

JOSEPH P. BRADY,

Clerk of the Circuit Court of the United States,

Eastern District of Virginia.

Allowed by

JAMES KEITH,

President Supreme Court of Appeals of Virginia.

213

*Citation.*THE UNITED STATES OF AMERICA, *ss.*:

The President of the United States to the Norfolk and Ocean View Railway Company, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of Appeals of the State of Virginia, wherein Arthur W. Depue and Walter H. Taylor, Trustee, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the President of the Supreme Court of Appeals of the State of Virginia, this 14th day of October, 1910.

JAMES KEITH,

President Supreme Court of Appeals of Virginia.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

Attest:

H. STEWART JONES,

Clerk Supreme Court of Appeals of Virginia.

We acknowledge service of the above this 15th day of October, 1910.

MUNFORD, HUNTON, WILLIAMS &
ANDERSON,*For Norfolk & Ocean View Ry. Co.*

Endorsed on cover: File No. 22,359. Virginia Supreme Court of Appeals. Term No. 152. Consolidated Turnpike Company, Arthur W. Depue, and Walter H. Taylor, Trustee, plaintiffs in error, vs. Norfolk & Ocean View Railway Company. Filed October 21st, 1910. File No. 22,359.

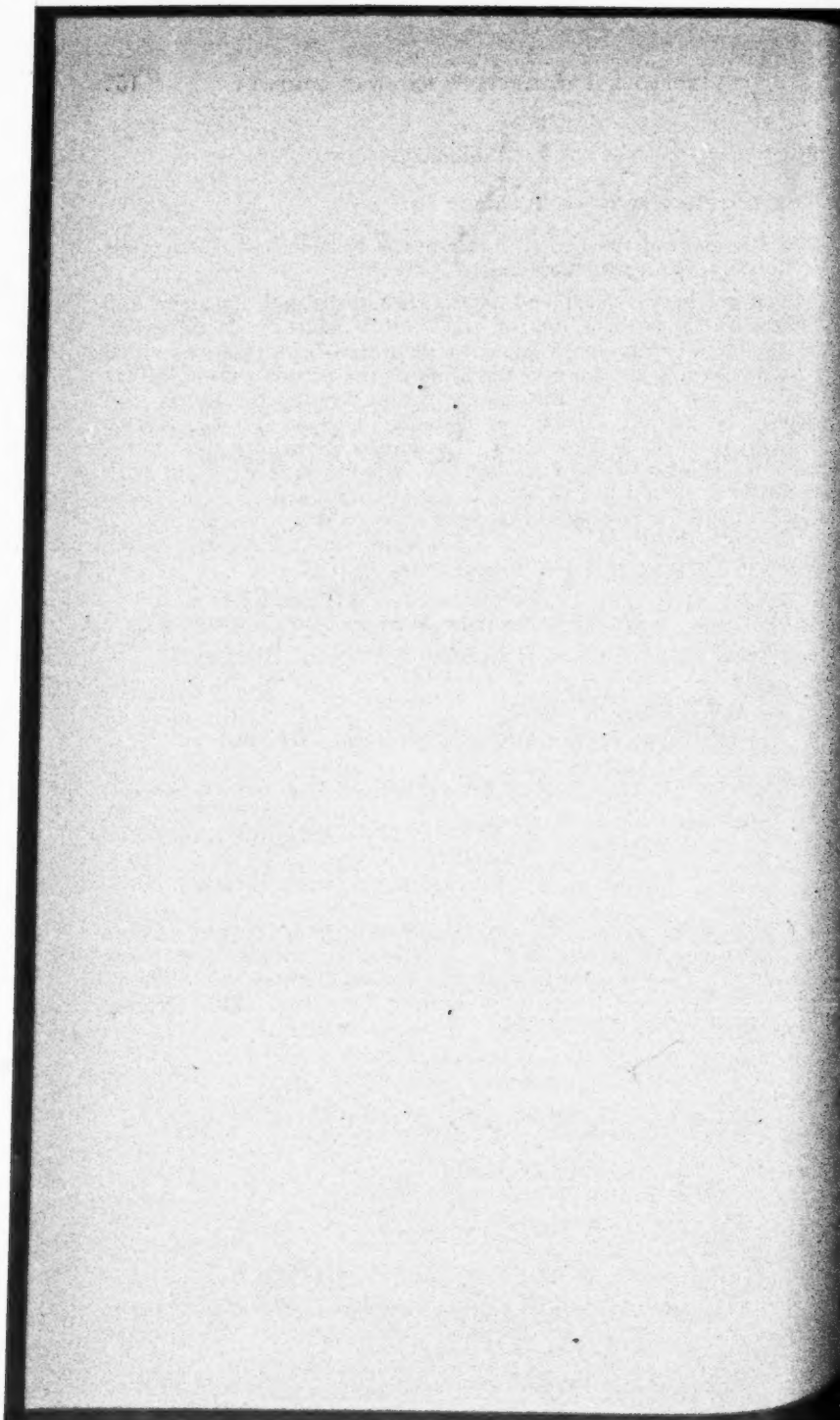


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NO. 152. OCTOBER TERM, 1912.

IN THE

Supreme Court of the United States

**CONSOLIDATED TURNPIKE COMPANY, ARTHUR W. DEPUE,
and WALTER H. TAYLOR, Trustee,**
PLAINTIFFS-IN-ERROR

VS.

NORFOLK & OCEAN VIEW RAILWAY COMPANY,
DEFENDANT-IN-ERROR

**In error to the Supreme Court of Appeals of the
State of Virginia**

BRIEF ON BEHALF OF THE PLAINTIFFS-IN-ERROR

STATEMENT OF THE CASE

This case comes before this Court on writ of error to the Supreme Court of Appeals of the State of Virginia involving the question whether or not certain condemnation proceedings had in the Courts of that State deprive the plaintiff-in-error, Walter H. Taylor, Trustee, of his property without due process of law contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

The facts necessary for an understanding of the points to be hereafter discussed are set forth in chronological sequence, as follows:

In 1900, there existed a turnpike running from Norfolk to Ocean View. This turnpike was one of the constituent turnpikes of the Consolidated Turnpike Company, and was subject to two mortgages, one for \$25,000 to Walter H. Taylor, Trustee, (Record, pp. 95-103) and another, inferior in lien, for \$200,000 to Walter H. Taylor, Trustee, (Record, pp. 103-114). This last mortgage covered turnpikes other than the one in question.

On March 3rd, 1900, the Bay Shore Terminal Company was formed, to erect an electric trolley line on a portion of this turnpike (Record, p. 89).

On March 1st, 1902, the Consolidated Turnpike Company conveyed to the Bay Shore Terminal Company this right of way. The deed recited the existence of the aforementioned mortgages upon the premises conveyed (Record, pp. 114-119). [The date of May 1st, 1902, is erroneously stated at certain places in the Record as the date of the deed.]

On October 9th, 1903, the Bay Shore Terminal Company became insolvent, and receivers were appointed by the Circuit Court of the United States for

the Eastern District of Virginia, in the suit of Fink vs. Bay Shore Terminal Company (Record, p. 2).

On January 18th, 1904, after the erection of the trolley line as above set forth, the present condemnation Act of the State of Virginia was passed by the Legislature (Code of Virginia, § 1105, f.).

In January, 1906, by order of the United States Circuit Court, the receivers were instructed to institute condemnation proceedings for the purpose of acquiring title to the property on which the said electric railway ran, clear of all encumbrances (Record, p. 26).

On March 3rd, 1906, this action of condemnation now before this Court was begun in the appropriate State Court of Virginia (Record, pp. 21-24).

On March 17th, 1906, a decree of foreclosure of the property of the Bay Shore Terminal Company was entered (Record, p. 4).

On April 26th, 1906, the Commissioners appointed in the condemnation proceedings made a report showing the value of the land, with the improvements erected at the time of the Report (May 15th, 1906), approximately the time of the commencement of the condemnation proceedings (March 3rd, 1906) to be \$57,200.00. The report also showed that the

price paid for the deed of the right of way was the equivalent of \$25,000; that the then value was \$5,000; and that the value of the bare land at the time of the report was \$6,200.00.

Exceptions were filed to this report by Arthur W. Depue, a bondholder; but no exceptions were filed by the predecessor in title of the defendant-in-error or by Walter H. Taylor, trustee, or by any one else. (Record, pp. 52-4).

On February 7th, 1907, a sale had under the said decree of foreclosure was confirmed, and the purchaser, the Norfolk and Ocean View Railway Company, a corporation created by and existing under and by virtue of the laws of the State of Virginia, received a conveyance of the property purchased "with the benefit of and subject to all suits or proceedings which may have been or may be instituted by the said receivers" (Record, p. 122).

In March, 1907, a foreclosure suit was instituted in the appropriate State Court to foreclose the aforesaid mortgage created by the Consolidated Turnpike Company (Record, p. 93).

On September 27th, 1907, upon supplementary bill filed by the Norfolk and Ocean View Railway Co. in the United States Circuit Court for the Eastern

District of Virginia, in the above named case of Fink vs. Bay Shore Terminal Company, a preliminary injunction was granted enjoining plaintiffs-in-error, Walter H. Taylor, Trustee, Arthur W. Depue, and the Consolidated Turnpike Company from "prosecuting any suit against the Consolidated Turnpike Company so far as the same affects the title or ownership of the property conveyed by the Commissioners of this Court to the said petitioner in the above entitled suit, or from doing any act or thing affecting the possession, use and enjoyment by the said Norfolk and Ocean View Railway Company of that certain parcel of land between Norfolk and Ocean View occupied by said Company as its right of way, being the same land which was conveyed to the said Company by the Commissioners of this Court under decree in this cause of the seventeenth day of February, 1907" (Record, p. 123).

In January, 1908, the issuance of this injunction was sustained by the Circuit Court of Appeals, on the ground that the purchasers at the sale were entitled to protection at the hands of the Circuit Court from any interference until the condemnation proceedings begun under the order of that Court were completed (Record, pp. 120-124).

In 1908, after the decision of the Circuit Court of Appeals, Walter H. Taylor, Trustee, plaintiff-in-error herein, moved the Court in which the condemnation proceedings were pending to confirm the award made by the commissioners in the sum of \$57,200. (Record, p. 124.)

Simultaneously, the Norfolk & Ocean View Railway Company appeared specially, as it claimed, in the said Court, and moved the Court to vacate and dismiss the proceedings, for certain reasons set forth (Record, p. 55). No motion was made at any time by defendant-in-error to confirm the award of the commissioners in any sum whatever. It contented itself with urging first, that its appearance was special; second, that the proceedings should be dismissed and vacated; and third, not that any award should be made, but that the award for \$57,200 was incorrect in law.

On July 23, 1909, the Court entered an order refusing to dismiss the proceedings, holding that the appearance of the Norfolk & Ocean View Railway Company amounted to a general appearance and made that company a party to the proceedings, and confirmed the award of \$57,200. The opinion of the Court below is found in the Record (Record, pp.

58-62) and is to the effect that the value of the property as it stood at the time of the commencement of the condemnation proceedings afforded the proper legal measure of damages, and not the value of the property at the time the Norfolk & Ocean View Railway Company's predecessor in title entered upon the land.

The Norfolk & Ocean View Railway Company appealed to the Supreme Court of Appeals of the State of Virginia from the award so confirmed. A series of assignments of error were pressed in the State Supreme Court, all except two to the effect that the proceedings below should have been dismissed. The remaining two are important and significant to us here, although it is of equal significance to note that no where, at no time, did the defendant-in-error endeavor to have any award in any amount confirmed, but the whole effort of its counsel was to procure the dismissal and vacation of the condemnation proceedings as an entirety. These two assignments of error are as follows: First, "that the Court erred in confirming that portion of the Report which took into consideration the value of the improvements placed upon the property by the Plaintiff-in-error [Defendant-in-error here] or its predecessor

in title instead of that portion of the Report which ascertained the value of the property to be taken without considering the value of the improvements." (at p. 131 of the Record). The second was based upon "the action of the Court in requiring the Plaintiff-in-error [Defendant-in-error here] within three months to pay the sum ascertained as just compensation into some National Bank in the City of Norfolk," (at p. 133 of the Record.)

In Virginia a writ of error is allowed only in the discretion of the Supreme Court of Appeals. The petition for the granting of such writ of error shows the controversy as it existed when the case came before the Supreme Court of Appeals. That petition contains the following language:

"To secure a review of the action of the Court in entering the order of August 6, 1909, overruling the motion of the Norfolk and Ocean View Railway Company to vacate and dismiss said proceedings, and confirming said report; and also the action of the Court in appointing commissioners in this cause, by its order of the 14th day of April, 1906, this petition is filed.

"The strip of land involved in this controversy is of vital importance to the petitioner,

"the Norfolk and Ocean View Railway Company,
"as a part of its right of way, and is approximately
"five miles in length. Your petitioner is advised
"that the Circuit Court of the United States in
"the equity proceedings therein pending, in which
"the Bay Shore property was sold, has full power
"and authority, independent of the condemna-
"tion proceedings, to adjust the claims between
"the several parties to the property in question,
"and that said condemnation proceedings should
"not have been instituted, and are not now neces-
"sary to secure a good title for your petitioner,
"and has so presented its claim in the petition for
"injunction heretofore referred to. Should, how-
"ever, your petitioner be in error in this position,
"and it be determined that condemnation pro-
"ceedings are necessary to secure a good title,
"your petitioner is desirous that such proceedings
"be so instituted and prosecuted as to secure, as
"against all parties, a good and sufficient title.

"Your petitioner is advised that the con-
"demnation proceedings had by said receivers
"are fatally defective and erroneous in many
"particulars, and that if your petitioner should
"comply with the order and direction of the Cir-

"cuit Court of Norfolk County and pay the large
"sum of money directed to be paid in these pro-
"ceedings, to-wit: \$57,200.00, yet it would not
"secure a good title," (at pp. 5-6 of the Record.)

The Supreme Court of Appeals of Virginia over-ruled all the assignments of error, except the one to the measure of damages and the one to the form of the award to be made (hereafter discussed), and reversed the judgment below. In addition to this reversal, the Supreme Court of Appeals, without motion to that effect and of its own motion, entered a final judgment (Record, pp. 135-136), declaring the sum of \$6,200 to be the proper amount of compensation, which was the sum stated by the commissioners to be the value of the land without improvements at the date of their report, to-wit: May 15th, 1906. Interest, however, was only allowed from August 6th, 1909 (Record, p. 136), although the date of original possession was March 1st, 1902, and the date of the report of the commissioners was May 15th, 1906.

The remaining assignment of error urged in the State Supreme Court was that it was directed that the defendant-in-error should pay the award into Court for the benefit of the plaintiffs-in-error and

others who might be interested, and that the only proper award was that the title should vest in the defendant-in-error if in its discretion it should determine to pay the award, but it should not be obliged so to do. The State Supreme Court sustained this assignment of error and held: That the payment of the sum awarded was only optional with the defendant-in-error.

This judgment of the Supreme Court of Appeals of the State of Virginia, entered of its own motion, constituted, as is claimed in the petition for a writ of error (Record pp. 145-148) and in the assignments of error (Record p. 144), a taking without compensation of the improvements existing upon the property since 1902, and was the first time when Walter H. Taylor, Trustee, was confronted by the possibility of such a taking. Since plaintiff-in-error Walter H. Taylor, Trustee, was before an appellate Court of last resort he could not file exceptions, nor make any motions setting up the fact that he was deprived of his property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States, except by a motion for a rehearing.

On September 5th, 1910, a petition for rehearing was therefore filed (Record, pp. 136-142).

On September 6th, 1910, the Court took the matter under consideration (Record, pp. 142-143).

On September 14th, 1910, the Court entered an order, saying: "The Court having maturely considered the petition aforesaid, the same is denied" (Record, p. 143).

On October 14th, 1910, the Court, and not the President Judge only, ordered it to be certified and made part of the record, that the constitutional question involved was raised by the petition for rehearing and that the petition was refused on the ground that the decision of the Court "did not constitute a taking of the property of the defendants-in-error without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, and that the said defendants-in-error were not thereby deprived of any rights under said Amendment to said Constitution." (Record, pp. 143-4).

A writ of error was then allowed to this Court.

SPECIFICATIONS OF ERROR

"And now come Consolidated Turnpike Company, Walter H. Taylor, Trustee, and Arthur W. Depue, plaintiffs-in-error, and make and file this their assignment of errors.

1. The Supreme Court of Appeals of the State of Virginia erred in reversing the judgment or decree of the Circuit Court of Norfolk County, Virginia, in favor of plaintiffs-in-error, for the reason that by so doing they authorized the taking of the property of plaintiffs-in-error without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

2. The said Supreme Court of Appeals of the State of Virginia erred in directing an award to the plaintiffs-in-error of only the value of the land, the condemnation of which is sought by this action, and not of the land with the improvements thereon erected, for the same reason."

ARGUMENT

There are two questions to be argued in this Court: First, whether the judgment of the Supreme Court of Appeals of Virginia taking private property for public uses was wanting in the due process of law required by the Fourteenth Amendment to the Constitution of the United States, as interpreted in the case of *Chicago, Burlington & Quincy Railroad Company vs. Chicago*, 166 U. S., 226 (1897); and, second, whether that question is properly before the Court under Section 709 R. S., and the decisions of this Court.

Although usually the jurisdictional question should properly be first discussed, yet inasmuch as an understanding of the Federal Constitutional question involved makes the jurisdictional question more readily apprehended and determined, the Federal Constitutional question will be first considered.

I. The Judgment of Virginia Court of Appeals is violative of the Fourteenth Amendment of the Constitution of the United States.

The statement of fact shows that after reversing the judgment below, the Supreme Court of Appeals of its own motion entered a new judgment assessing the value of the land at \$6,200 and providing that the Norfolk and Ocean View Railroad Company should be vested with the title to the land upon paying at their option the sum of \$6,200. It is the contention of Walter H. Taylor, Trustee, plaintiff-in-error, that the entering of this judgment by the Supreme Court of Appeals offends against the Fourteenth Amendment to the Constitution of the United States, in that it deprives Walter H. Taylor, Trustee, of his property without due process of law. It is submitted that due process of law in entering this judgment is lacking for three reasons: (a) because no opportunity was afforded to Walter H. Taylor, Trustee, to be heard on the adequacy of the award made by the Court of Appeals and on the legal principles controlling it; (b) because the award as entered sustained a taking of property of Walter H. Taylor, Trustee, without requiring compensation to be paid therefor: in that the possession by the

Norfolk and Ocean View Railway Company has been maintained since the beginning of these condemnation proceedings to date, and the judgment simply gives to that company an option now to take or leave the property as it may desire; (c) because by the terms of the decree Walter H. Taylor, Trustee, was not compensated for any of the improvements upon the property.

It is not often that this Court is called upon to say that the decree of a State Court in itself deprives one of property without due process of law; such a situation usually arises out of a specific statute alleged to contravene the Fourteenth Amendment. There can be no doubt, however, that a State Court is an instrumentality of the State, and that in its judgments it must conform to the requirements of the Fourteenth Amendment. Bülow, in *Gesetz und Richteramt*, writes as follows:

"A judicial decree is as much as a statute
 "the act of the law-making power of the State.
 "Like the legislative determinations of the Law,
 "so the judicial determinations are filled with the
 "power and compulsive force of the State. A
 "judgment of a court has the force of Law; it

"carries the whole force of the Law with it. "A judicial determination of Law has, in the "region belonging to it, the power of a fixed, legal-
"ly binding order, more fully, with stronger, more
"direct working, than the statutory, merely ab-
"stract statements of the Law. The power of
"Law is stronger than the power of Legislation,
"a legal judgment maintains itself even if it
"contradicts a statute. Not by its legislative,
"but by its judicial determinations, the law-regu-
"lating power of the State speaks its last word."

The same principle is recognized by this Court in a series of cases beginning with *Chicago, Burlington and Quincy R. R. Co., vs. Chicago*, 166 U. S. 226 (1897). It would be well to summarize this condemnation case and those that have followed it. Therein the highest Court of Illinois had sustained the award of \$1.00 to the Railroad for the opening of a City street across its tracks. The first contention of the City was that the question as to the amount of compensation was one of local law merely, and that the requirement of due process of law was observed by determining that question in the mode prescribed by the Constitution and laws of

Illinois, which gave to the Railroad the right of hearing in Court. Upon this first question, the Court held that "in determining what is due process of law regard must be had to substance, not to form." (at page 235). And the Court proceeded to say:

"Due process of law as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public. The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation." (at pp. 236-7).

The conclusion on this head was as follows:

"In our opinion, a judgment of a State Court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the

"due process of law required by the Fourteenth
"Amendment of the Constitution of the United
"States, and the affirmance of such judgment by
"the highest Court of the State is a denial by that
"State of a right secured to the owner by that
"instrument." (at page 241).

The second question was whether the necessary effect of the proceedings had been to appropriate to the public use without compensation any property right of the railroad. An examination of the rulings of the Court was made, and it was finally held that the railroad's rights to use its property as a right of way were not necessarily affected by the opening of the street, and that the jury and the State Court had a right to determine the damages with a view to the actual conditions existing. The Court said:

"Compensation was awarded to the railroad
"company upon the basis of the value of the
"thing actually appropriated by the public—the
"use of the company's right of way for a street
"crossing, having regard to the purposes for
"which the land in question was acquired and held
"and was always likely to be held." (at page 258).

Applying the principles enunciated in this decision to the facts of the case at bar, we find it held that the Courts of the State are one of the instrumentalities of the State and that the prohibition of the Fourteenth Amendment applies to its judicial authority as well as to its legislative. If, therefore, the effect of the judgment entered by the Supreme Court of Appeals of Virginia does, by its rulings of law, deprive plaintiffs-in-error of their property without compensation, that ruling and judgment offends against the prohibition of the Fourteenth Amendment to the Constitution of the United States. Turning again to the criterion laid down in this same case as to the proper measure of damages to be observed, the same reasoning which justified the State Court in holding that the damages to be awarded might be based on the actual use and condition of the property as it stood when condemnation was had, logically requires that the damages to be awarded herein should be based upon the value and condition of the property at the time of the condemnation.

In *Backus vs. Fort Street Union Depot Company*, 169 U. S. 557 (1898), this Court thus summed up its former decision:

"It is also not open to further debate, since "the decision in Chicago, Burlington & Quincy "Railroad vs. Chicago, 166 U. S. 226, that this "Court may examine proceedings had in a State "Court, under State authority, for the appropriation of private property to public purposes, so "far as to inquire whether that Court prescribed "any rule of law in disregard of the owner's right "to just compensation." (at page 565).

In *Boston Chamber of Commerce vs. Boston*, 217 U. S. 189 (1910), this Court states "the only question to be considered is whether when a man's land is taken he is entitled by the Fourteenth Amendment to recover more than the value of it *as it stood at the time*." The facts in that case were that the petitioners held the land condemned subject to servitudes, and they "contended that they had a right, as matter of law under the Constitution, after the taking was complete and all rights were fixed, to obtain the connivance or concurrence of the dominant owner, and by means of that to enlarge a recovery that otherwise would be

limited to a relatively small sum." (at page 194). This Court held that the value and use of the land *at the time* was the only possible criterion.

In *Appleby vs. City of Buffalo*, 221 U. S. 524 (1911), the proceedings by the City were to appropriate lands under the waters of the Buffalo River. The cases were reviewed, and it was held that the record did not disclose any ruling of law of a State Court which prevented the owner from obtaining just compensation.

The three reasons why the judgment of the Supreme Court of Appeals of Virginia offends against the Fourteenth Amendment will now be separately considered.

A. No opportunity was afforded to Walter H. Taylor, Trustee, to be heard on the adequacy of the award made by the Court of Appeals and on the legal principles controlling it.

The record gives not only the report of the Commissioners, but also all of the evidence offered before them. The practice is for the Court to examine this evidence and then to enter an award upon it, or refer the case back for further taking of testimony. An

examination of the report shows that the commissioners stated that the value of the land on May 1st, 1902 was \$5,000; that the value of the land without improvements on the date of the report was \$6,200; that the value of the land with improvements (whatever that might mean) at the date of the report was \$7,200; and that the value of the various fixtures placed upon the property by the predecessor of the Norfolk and Ocean View Railway Company amounted to \$50,000 additional. The commissioners further reported that the price paid for this property at the time of its purchase was four-fifths of the total value, namely \$20,000. An examination of the testimony shows that only one witness (one Page, the President of both companies) was heard on the question of the value of the land. He testified that considering the adaptability of the land for railway purposes he thought the right of way was worth \$18,000 (Record, p. 69) in 1902, and the two and a half ($2\frac{1}{2}$) acres with water front, upon which the power house was built was worth \$2,000 (Record, p. 70). He further testified that he considered the two and a half ($2\frac{1}{2}$) acres with the water front worth \$5,000 or \$6,000 at the time of the report, without improvements (Record, p. 71),

and the value of the right of way to a railway at \$30,000 (Record, p. 75). The other witness called testified wholly with respect to the value of the railroad equipment on the property, and with respect to the receipts from tolls. Not a single witness contradicted Page as to values in any way. There was, therefore, no testimony whatever in the case by which the value in 1902 could have been fixed at \$5,000, or the value in 1906 fixed at \$6,200 without improvements.

Furthermore, there was no evidence that many of the improvements on the land were not on the land at the time it was acquired by the Bay Shore Terminal Co. The bridge, at least, was there. In no way whatever, can the figure of \$6200 be arrived at as the value of the property at the time of the condemnation, even if other improvements placed upon the property by the predecessor in title of the plaintiff-in-error be excluded.

True it is that these are questions which should properly be urged before the trial Court. The argument here is not that these are points for the consideration and determination of *this* Court, but that Walter H. Taylor, Trustee, has been deprived of his constitutional right to be heard before the

trial Court on these questions; and that the action of the State Supreme Court in making of its own motion, an award as to the merits on which Walter H. Taylor, Trustee, was never heard, and which neither the Court below nor the Court of Appeals had been asked to make, is a proceeding without due process of law. If Walter H. Taylor, Trustee, be not entitled under the Fourteenth Amendment to a ruling by this Court that he cannot be deprived of that part of his property represented by improvements, placed on it; he is at least entitled to a hearing before the trial Court as to the amount to which he is entitled, and not to have an Appellate Court suddenly, without hearing on that question, or without that issue being squarely before it, enter a judgment which deprives him of his property. The very best evidence of the dangers of this almost judicial legislation may be found from the fact that the agreement between the parties was \$25,000., and now the amount is found without evidence to be \$6,200. Explanations can of course be sought. They are evidently to be found to reside in the fact that the commissioners, in estimating with respect to improvements and conditions, have disregarded all existing improvements and the uses to which the land could be put, whether or not those

improvements were or were not placed upon the property by the Norfolk and Ocean View Railway Company by the predecessor in title of the defendant-in-error. Where is there a line in the commissioners report to show that the improvements upon the land were *wholly* placed upon the property by the predecessor in title of the Norfolk and OceanView Railway Company? An examination of the record makes it very plain that the question asked the Commissioners was: What was the value of the property at the time of condemnation eliminating improvements placed upon the property by the predecessor in title of the defendant-in-error? There is no answer to this question to be found on the record. That question was not argued or raised in the trial Court or passed upon by that Court. In the Appellate Court that question was not raised by assignments of error or otherwise, but the Supreme Court of Appeals, without that issue being raised before them, or any evidence on which to base a finding thereon being at their disposal, determined the value to be \$6200. No hearing was afforded Walter H. Taylor, Trustee, on this question, and the judgment of the Court so entered, it is submitted, was entered without due process of law.

B. The award as entered sustained a taking of property of Walter H. Taylor, Trustee, without requiring compensation to be paid therefor: in that the possession by the Norfolk and Ocean View Railway Company has been maintained since the beginning of these condemnation proceedings to date, and the judgment simply gives to that company an option now to take or leave the property as it may desire.

The Supreme Court of Appeals of Virginia sustained the seventh assignment of error to the effect that there was "no authority or warrant in law to direct judgment upon this award." The Supreme Court therefore entered an award giving to the Norfolk and Ocean View Railway Company an option to pay the sum of \$6,200, saying in their opinion: (Record, p. 134).

"Whatever be the reason of our law-making
"power for not authorizing a personal judgment
"in the class of cases provided for, we find no
"authority in the statute for entering a personal
"judgment in this case, and to do so would seem
"to be contrary to the principle upon which our
"statute was framed."

This means that property may be taken and held by a railroad company, but that it does not have to

pay for it, unless it feels so inclined. Quoting again, from the case of Chicago, Burlington and Quincy R. R. Co., vs. Chicago, it is there said:

"In our opinion, a judgment of a State Court, even if it be authorized by statute, where-
"by private property is taken for the State or
"under its direction for public use, without com-
"pensation made or secured to the owner, is,
"upon principle and authority, wanting in the
"due process of law required by the Fourteenth
"Amendment of the Constitution of the United
"States, and the affirmance of such judgment by
"the highest Court of the State is a denial by that
"State of a right secured to the owner by that
"instrument," (at p. 241).

Compensation is surely not made or secured to the owner if the decree to be entered in a condemnation case is only that the Railway Company shall have an option to keep the land or not. In the case at bar, almost seven years have elapsed since Walter H. Taylor, Trustee, was enjoined by a Federal Court from proceeding to foreclose under his mortgage. Now, he is told that he is not entitled to a judgment for the land which has been in the possession of the

Norfolk and Ocean View Railway Company ever since, but only to a decree that if the Railway Company chooses at its option so to do, it can obtain title from him by paying the sum of \$6,200, and that, too, with interest only from 1909. Is it possible that the right of eminent domain is to be so extended that railroads of this country shall have the privilege to enter upon anyone's property, occupy it during litigation without either making or securing compensation, and then when the litigation turns out adversely, abandon the property?

It has been held that this securing of compensation by entering a bond to pay what shall thereafter be determined to be just, is a compliance with the constitutional requirement. It has also been the custom in some States to allow condemnation to be begun and possession not to be delivered until compensation be determined and paid. In these States, after the condemnation has been begun, the railroad has been allowed to abandon the proceedings provided possession has not been taken. To hold, as in the case at bar, that condemnation proceedings may be prosecuted and possession maintained thereunder, but that the final award must take the shape of an option to a railroad company to

pay or not, is, it is submitted, to enter a judgment contravening the Fourteenth Amendment.

C. By the terms of the decree Walter H. Taylor, Trustee, was not compensated for any of the improvements upon the property.

On March 1st, 1902, and thereafter until the corporation act of May 21st, 1903, it was the law of the State of Virginia that no corporation, even though possessing the power of eminent domain, could take the property of another corporation which also possessed this power. Great Falls Power Company vs. Great Falls and Old Dominion R. R. Co., 104 Va. 416 (1905). This was the express decision in this case. Both the Bay Shore Terminal Company and the Consolidated Turnpike Company possessed the power of eminent domain. The legislative wisdom of Virginia, however, after the improvements were put upon this property, modified the law in this respect, and provided (Code, § 1105 e 52) that a corporation desiring to take by eminent domain the property of another corporation possessing the power of eminent domain could only do so in a case where

business interest required, and where as a condition precedent to any condemnation the consent of the Corporation Commission of the State of Virginia should be obtained.

After the passage of the above Acts the condemnation proceedings now before this Court were begun. These resulted in the confirmation of a report made by the Commissioners in the sum of \$57,200, which award took into account the value of the property as it existed at the time of the condemnation with the improvements thereon. Before the Lower Court on the motion of plaintiffs-in-error to confirm, the contention of the defendant-in-error was that the proceedings should be dismissed and vacated for reasons not of immediate significance here, and it appealed from the judgment confirming the award of \$57,200.

The award to the plaintiffs-in-error of \$57,200 could have been sustained by the lower Court on either of two grounds; first, on the ground taken by the lower Court, and second, on the ground that to hold otherwise would deprive Walter H. Taylor, Trustee, of compensation for improvements upon the land, and to deprive him of property without due process of law, contrary to the Fourteenth Amend-

ment to the Constitution of the United States. What the Court did was to consider the ground taken by the lower Court, and to disagree therewith, holding on this point "that where a corporation, clothed with
 "the power of eminent domain, lawfully enters
 "into the possession of land for its purposes, and
 "places improvements thereon, and afterwards
 "institutes condemnation proceedings to cure a
 "defective title, or to extinguish the lien of a
 "deed of trust, it is not proper in ascertaining
 "just compensation for such land to take into
 "consideration the value of such improvements."
 (Record, p. 133.)

But it is submitted that however this point may be decided, it cannot affect the second question, namely, whether the proceedings deprive an owner of land of his property without due process of law. The ground for the principle of law enunciated by the Supreme Court of Appeals must be that no title to improvements made by a corporation having the right of condemnation can properly be said to become vested in a mortgagee, inasmuch as that corporation had *at the time* the right of condemnation. Or, to put it otherwise, that such title as was acquired

by the mortgagee was acquired subject to be divested by the exercise on the part of the corporation of the power of eminent domain which it possessed. It would seem that the only correct statement of the law would be that it was applicable only to corporations possessing the power of eminent domain at the time when they entered upon the property in question, or when they made the improvements. Otherwise, once let it be that the title to the improvements has absolutely vested in the owner of the land before the passage of the legislation and the granting of the power of eminent domain, then the application of such legislation in such a manner as to refuse any and all compensation for the improvements, is to deprive the owner of property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States. To say that because he is paid for one part of his property, the land itself, and not for the other part of his property, the improvements, he receives full compensation, contains as evident a fallacy as to say that if two separate lots were taken and one paid for, the party would not necessarily be deprived of his property without due process of law. The gist of the matter is that, had

there been no legislation, there could be no question whatever that the improvements came within the lien of the mortgage. There has been legislation. If that legislation be applied so as to take away title to property that without it existed unchallenged, then certainly such a taking would be a taking without due process of law.

The contention on this head of Walter H. Taylor, Trustee, plaintiff-in-error, that the judgment of the Supreme Court of Appeals of Virginia, operates to deprive him of property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, is a simple proposition. It may elucidate his contention to put it into propositions used in formal logic. The argument can be compressed into three syllogisms; the conclusion of the first becoming the minor premise of the second, and the conclusion of the second becoming the minor premise of the third. The following, therefore, is the argument of Walter H. Taylor, Trustee, plaintiff-in-error put into syllogistic form:

First Syllogism.

All improvements become property securing a mortgage, apart from existing rights of condemnation.

The improvements made in case at bar, were made before condemnation Act had been passed, when no right of condemnation existed.

Therefore, the improvements made in case at bar became property securing the mortgage.

Second Syllogism.

The opinion of State Supreme Court holds that plaintiff-in-error, Walter H. Taylor, Trustee, is not entitled to compensation for the taking of the improvements made in case at bar.

The improvements made in case at bar became property securing the mortgage.

Therefore, the opinion of State Supreme Court holds that plaintiff-in-error, Walter H. Taylor, is not entitled to compensation for the taking of property securing his mortgage.

Third Syllogism.

Any holding that a party is not entitled to compensation for the taking of property securing his mortgage, is contrary to the Fourteenth Amendment to the Constitution of the United States.

The opinion of State Supreme Court holds that plaintiff-in-error, Walter H. Taylor, Trustee, is not entitled to compensation for the taking of property securing his mortgage.

Therefore, the opinion of State Supreme Court is contrary to the Fourteenth Amendment to the Constitution of the United States.

Any attack upon the validity of the foregoing logical argument must be based on a denial of the major premiss of the first syllogism. It is theoretically possible that this could be attacked on one of two grounds: first, that the improvements in question were not of such nature as to become part of the free-hold; or second, that the exception should extend to future rights of condemnation. On the first head it is unnecessary to multiply authorities. That the improvements in this case, a bridge, a power house, the machinery therein, the lands and the tracks become real property and within the lien of the mortgage of Walter H. Taylor, Trustee, is established by so many cases that their citation alone is sufficient.

The principle enunciated in many cases that, as between landlord and tenant and some other parties, Courts will be astute to treat fixtures as not becoming part of the realty but as being property which can be removed at the end of the term, has no application to the case at bar. For this case is really one between

mortgagor and mortgagee, inasmuch as the deed to the predecessor of the defendant-in-error expressly recited the existence of the mortgages. The law on this subject is clearly settled in Virginia. In the case of *Graeme vs. Cullen*, 23 Gratt. 266 (1873)—which case is quoted as an authority by this Court in *Warner vs. Grayson*, 200 U. S., 257 (1906)—it is said:

"And first—all buildings and other improvements and fixtures put upon mortgaged premises by the mortgagor, after the execution of the mortgage, become a part of the freehold, and enure as such to the benefit of the mortgagee. There are a great many authorities on this subject, but no conflict among them. All affirm or recognize the principle just stated. * * * * There is no necessity to adopt any liberal rule in regard to fixtures to enable the mortgagor to remove what he has erected at his own expense, because he has the full benefit of all such improvements when he regains the estate by redemption, which he may do simply by payment of his actual debt. The general rule of the common law, therefore, that what is fixed to the freehold becomes part of the realty, and passes with it, has its full effect in regard to things

"erected on the land by an owner who subsequently mortgages the land, and also in regard to things erected by the mortgagor after the mortgage. It was argued that a mortgagor in possession is tenant to the mortgagee, and the authorities were cited to show the temporary buildings erected by a tenant at his own expense may be removed. This we think is founded on a fallacy." (at page 289).

The Court of Appeals of Virginia has consistently followed this principle laid down in *Graeme vs. Cullen*: *Green vs. Phillips*, 26 Gratt. 752 (1875), *Shelton vs. Ficklin*, 32 Gratt. 727 (1880), *Morotock Ins. Co. vs. Robefer*, 92 Va. 747 (1896), *Haskins Wood Co., vs. Cleveland Co.*, 94 Va. 439 (1897).

The second point, namely, that a statute passed in the future can deprive a mortgagee of property which has become part of the security of his mortgage, would seem an untenable proposition. It amounts to saying that *a future statute can displace existing rights*. The best argument would seem to be this simple italicized statement.

One case, however, remains which requires careful consideration on this point: the case of *Searl vs.*

School District, 133 U. S. 553, (1890). Therein, a School District, confronted with the fact that there were two outstanding titles to certain land it desired to acquire, acting under legal advice, purchased one title. The School District built its school building, and then was ejected by the owner under the other title. The School District thereupon began condemnation. It was held that the owner of the legal title was not entitled to recover the value of the school building. The distinction between this case and the one at bar is very clearly set forth in the opinion filed by the Circuit Court herein, where they say of this Searl case:

“The Court’s decision rested upon the fact, “admitted in the pleadings, that the School District purchased the land upon which it subsequently erected its school building under the bona fide belief that it was acquiring a complete and perfect title thereto. There the situation was vastly different from that in the present case. In the Searl case the School District honestly believed that it was the absolute owner of the land which it undertook to improve; in the present case the Terminal Company knew that it was not the absolute owner of the land bought

"by it and that it could not acquire complete
"title thereto until the liens against the same were
"released. Again from the opinion in the Searl
"case it is to be inferred that if the School Dis-
"trict has entered as a trespasser, it could not
"have invoked the equitable principle upon
"which the case was decided. Although in the
"case at bar the Terminal Company may not
"have entered as a trespasser, it necessarily
"knew at the time that it would become an in-
"truder upon the rights of trustee and creditor
"whenever default was had under the trust deeds
"and foreclosure sought to be exercised against
"the trust property," (at p. 62 of the Record).

What the Court refers to is the fact that the conveyance of the property in question recited the existence of the mortgages to Walter H. Taylor, Trustee. The opinion of this Court in Searl vs. School District shows that the decision there rested upon the peculiar facts of that case. The occupation here, it is said, was in no respect for a private purpose or pecuniary gain, but strictly and wholly for the public use. There could be no presumption that this public agent intended to confer public property upon a private individual.

Attention must further be called to one additional fact set forth in the following quotation from the opinion of this Court in this case of *Searl vs. School District*:

"It is not denied that the school district, "when it filed its petition, was entitled to acquire "the property in the exercise of the power of "eminent domain, but it is said that it could "not do so prior to February 13, 1883, the date "of the passage of an act rendering such action "on its part lawful. Sess. Laws, Colorado, 1883, "263; Gen. St. Sec. 3044, 893. But we cannot "perceive that this affects the precise question before us. Inability to condemn indicates that "possession was not taken with the view of proceedings to that end, but that is conceded on the "other ground, that the school district believed "that it had the better title and erected its building accordingly. When it came to possess and "exercise the power, the inquiry was limited to "such compensation as was just and did not embrace remote or speculative damages, or payment for injuries not properly susceptible of "being claimed to have been sustained." (at p. 564).

A close examination, however, of the facts shows that legal title did not vest in the party seeking condemnation until February 2, 1884, almost a year after the passage of the condemnation act. In the case at bar, the improvements were placed upon the property after the obtaining of a conveyance expressly subject to the mortgages to Walter H. Taylor, Trustee, with full knowledge of the existence of these mortgages and of the fact that buildings and improvements placed upon the property necessarily become part of the security for the mortgage. *There was no mistake of law or of fact.* The title to these improvements forthwith became vested in Walter H. Taylor, Trustee. The passage of a subsequent act by the State of Virginia, if it takes away such title, must necessarily afford compensation, or it deprives him of his property without due process of law. Any other result would open the door to every kind of manipulation at the expense of mortgagees. In the case at bar, the value of the property, as was shown by the testimony, has been largely destroyed by building along a turnpike a trolley road and diverting travel. If the bondholders obtained, as they did obtain under the existing law at the time of giving the conveyance, additional security, the conveyance

would not injure them. If they were at the mercy of any subsequent act of condemnation, it is obvious that they must lose their investment. They lost an operating turnpike, having a large value; by the act of the stockholders they admitted a rival which has almost destroyed the value of their property. They are now asked to accept the bare value of the property without any inquiry even as to the improvements which may have been put on the property when it was conveyed to the Trolley road, or which still remained on it, not put there by the Trolley road. It is submitted that an interpretation of a statute which intervenes to deprive Walter H. Taylor, Trustee, without compensation, of an existing legal position taken voluntarily by the predecessor in title of the Norfolk and Ocean View Railway Company, is an infringement of the provisions of the Fourteenth Amendment.

II. The remaining question to be discussed is the question of the jurisdiction of this Court arising under Section 709, Rev. Stat.

The facts shown by the Record bearing on this question may be briefly summarized as follows. A condemnation proceeding under the Virginia Statutes is a proceeding *in rem*, and in the case at bar was begun by the predecessor in title of the defendant-in-error. Notice was served on, among others, Walter H. Taylor, Trustee under certain mortgages upon the property in question, the plaintiff-in-error really interested here. The position of Walter H. Taylor, Trustee, was that it remained for him to take what under the proceedings should finally be properly adjudged as the damages to which he was entitled as Trustee under the mortgage deed. In no way did he desire to contest the validity of the proceedings themselves. He did not appear in Court or make any motions whatever, as he was not required to under the existing practice, until after he had been defendant in the suit of the Norfolk & Ocean View Railway Company against Walter H. Taylor, Trustee, begun in the Federal Court. From the injunction

granted against him in that suit he appealed to the Circuit Court of Appeals (Record, pp. 120-4), reported in 162 Federal Reporter, page 452. After the decision in that case, he moved the Court below to confirm the award of \$57,200 and obtained the judgment and order found in the Record, pp. 55-7. In opposition thereto, the defendant-in-error urged the dismissal and vacation of the entire proceedings. From this order the defendant-in-error appealed to the State Supreme Court asking it to vacate and dismiss the proceedings, and further asking that should the defendant-in-error "be in error in this position and it be determined that condemnation proceedings are necessary to secure a good title, your petitioner is desirous that such proceedings be so instituted and prosecuted as to secure against all parties a good and sufficient title." Nowhere, at any time, did the defendant-in-error ask that the award of \$6,200 should be made, or an award in any other sum. On appeal, before the Court of Appeals, counsel for Walter H. Taylor, Trustee, contended, as is evident from the brief of defendant-in-error and the opinion of the Court, first, that the proceedings were regular, or if not, that defendant-in-error was estopped from denying their

regularity; second, that the award of \$57,200 should be confirmed because the decisions of the Supreme Court of Appeals of Virginia required such a conclusion, and because to decide otherwise would violate the constitutional rights of Walter H. Taylor, Trustee. The Supreme Court of Appeals sustained the position of Walter H. Taylor, Trustee, that the defendant-in-error was estopped to deny the validity of the proceedings, but they held that Walter H. Taylor, Trustee, was not entitled to any compensation whatever for the improvements which had been placed upon his land in 1902. At no stage of these recounted proceedings was Walter H. Taylor, Trustee, threatened with the entry of a judgment nominally in his favor but which denied him the right to compensation for a portion of his property. The Supreme Court of Appeals did not grant the prayer of the plaintiff-in-error to vacate and dismiss the proceedings, but seized upon a statement in the Commissioners' Report and of their own motion entered a judgment in favor of Walter H. Taylor, Trustee, which judgment did not recognize any right of compensation for the greater portion of his property, to-wit, the improvements which had attached to the land of the mortgage of which he was trustee. Con-

fronted for the first time out of a clear sky, as it were, with this act of the supreme judicial authority of the State of Virginia depriving him of his property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, Walter H. Taylor, Trustee, filed a petition for re-hearing, which was the first opportunity which he had on the record to question the validity of the judgment so entered. The re-hearing was refused, but by order of the Court it was ordered to be certified and made part of the record that the constitutional question raised in the petition for re-hearing, and the claim of Walter H. Taylor, Trustee, that the judgment of the highest judicial instrument of the State of Virginia was a taking of his property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, was considered by the Court and decided adversely to the claim so made by Walter H. Taylor, Trustee.

An attempt has been made toward an exhaustive analysis of the decisions of this Court on the question whether a Federal constitutional question properly appears in the record when appellate proceedings are had under Section 709 Rev. Stat.

While the facts of this case make it almost anomalous and without a parallel in precedent, yet it is believed that this analysis amounts to a demonstration that under Section 709 Rev. Stat. and the decisions of this Court, this Court should take jurisdiction to determine the Federal constitutional question hereinabove argued. There are several different considerations under which the jurisdiction of this Court in similar cases has been sustained. These may be considered seriatim:

(a) The first of these considerations arise in cases where the Federal Constitutional question raises an authority exercised under a State on the ground of its repugnance to the Constitution of the United States. The points involved are perhaps best set forth in the case of *Water Power Co. vs Street Railway Company*, 172 U. S. 475 (1899), wherein this Court pointed out that under Section 709 Rev. Stat. there were three classes of cases in which the final decree of the State Court might be re-examined in this Court.

(1) "Where is drawn in question the validity of a treaty, or statute of, or authority exercised under, the United States, and the decision is against their validity;

(2) "Where is drawn in question the validity of a statute of, or an authority exercised under, any State on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity;

(3) "Or where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity specially set up and claimed by either party under such Constitution, statute, commission or authority." (at page 488.)

And this Court concluded:

"Where the validity of a treaty or statute of the United States is raised, and the decision is against it, or the validity of a state statute is drawn in question, and the decision is in favor of its validity, this Court has repeatedly held that, if the Federal question appears in the record and was decided, or such decision was necessarily involved in the case, and the case could not have been determined without deciding such

"question, the fact that it was not specially set up and claimed is not conclusive against a re-view of such question here." (at page 488.)

If the argument that the authority exercised by the judicial instrumentality of the State of Virginia operated to deprive Walter H. Taylor, Trustee, of his property without due process of law, has any validity at all, it will have been seen that such question was clearly and necessarily involved in the entry by the Supreme Court of Appeals of the judgment complained of, and that that judgment could not by any conceivable process of reasoning have been entered without deciding such question. The judgment itself was based upon the decision of the Court that no compensation whatever should be allowed to Walter H. Taylor, Trustee, for the improvements, and resulted from the operation of a condemnation statute passed AFTER the title to such improvements had vested in Walter H. Taylor, Trustee.

Furthermore, inasmuch as it is the judgment of the Court of Appeals in entering a Decree finding the damages to be \$6200. without any hearing on the confirmation of such an award, or any evidence being taken to substantiate it, the constitutionality of

which is in question, it follows that the raising of the constitutionality of that judgment could only be by a motion made after its entry, namely, the petition for re-hearing.

True it is that in *Osborne vs. Clark*, 204 U. S. 565 (1907), this Court said, referring to the above case, and to that of *McCullough vs. Virginia*, 172 U. S. 102 (1898):

"These and similar cases, however, are not
"to be pressed to the point that, whenever it
"appears that the state law logically might have
"been assailed as invalid under the Constitution
"of the United States, upon grounds more or less
"similar to those actually taken, the question is
"open. If a case is carried through the state
"courts upon arguments drawn from the state
"constitution alone, the defeated party cannot
"try his chances here merely by suggesting for the
"first time when he takes his writ of error that the
"decision is wrong under the Constitution of the
"United States." (pp. 568-569).

In *Osborne vs. Clark*, the appellant in this Court had filed a bill in the lower Court, in which he

had set forth at length his objections to certain legislation of the State based on its unconstitutionality under the State Constitution, and with no reference whatever to the Federal Constitution. The very essence of his case, if a Federal question were involved, lay in raising this Federal question in his Bill. The language of the Court was uttered with reference to these particular facts. But here, Walter H. Taylor, Trustee, did not begin any action or defend any action. It was only when the Court of Appeals entered of its own motion its confirmation of an award of \$6,200, and judgment thereon, that the rights of Walter H. Taylor, Trustee, were infringed, or even threatened.

Condemnation proceedings may be nominally adverse to the interests of a party standing in the position of Walter H. Taylor, Trustee; but in reality when his property has been already taken, he often desires to have the proceedings upheld, so that he may receive just compensation. Therefore, Walter H. Taylor, Trustee, was necessarily in position of acquiescence in the actions of the Court, until suddenly those actions were reversed and a judgment foreign to the issues raised by any of the parties was suddenly entered. All that he could have said and did say as

to the proper measure of damages, with respect to the constitutional questions involved, was necessarily *arguendo*. Inasmuch as that Federal constitutional question was directly and necessarily involved in the decision, and inasmuch as that decision sustained "an authority exercised under" a State, it falls within the second class of cases above recited, and this Court has jurisdiction to determine it.

(b) The second ground for sustaining the position of Walter H. Taylor, Trustee, that the Federal Constitutional question should be considered by this Court, rests on the fact that it was raised in the record of the State Court by the petition for re-hearing. True it is that as a general and almost universal proposition of practice it is too late to raise by a petition for re-hearing a Federal constitutional question. But it is submitted that this case is in this regard *sui generis*.

The annexed table is presented as an effort toward an exhaustive analysis of the decisions of this Court with reference to the raising of constitutional questions in a petition for re-hearing.

An examination of these tabulated cases reveals the fact that the ground of the general rule of practice

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with respect to the involution of Federal questions, is that Section 709 Rev. Stat. expressly grants jurisdiction to this Court in cases where certain prerequisites are complied with, namely: first "the drawing in question" of the validity of the authority exercised by a State; and second, the decision in favor of its validity. A petition for re-hearing is necessarily a proceeding in the Court below, so far as this question is concerned. Its function is wholly different from that of assignments of error, or a petition for a writ of error. It can therefore hardly be said that the constitutional question was not drawn in question where it is set forth properly in the petition for re-hearing. The difficulty is that when such petition is refused without further action by the Court, the Court cannot properly be said to have decided it in favor of the validity of the statute or act complained of. The denial of a petition for re-hearing is a matter of discretion. The refusal may be based on the ground that the objection was made too late, and was in effect waived.

Examining, with these thoughts in mind, the cases above tabulated, one observes that in the large majority of cases the appealing party in this Court was also the appealing party in the Supreme Court

of the State. The significance of this fact lies in the consideration that such appealing party had every opportunity in the State Supreme Court to present by his assignments of error the precisely identical questions attempted to be presented by the assignments of error in this Court. Obviously, on the very face of things, such appealing party was endeavoring to do here what he should first have done when he had the same opportunity in the State Supreme Court, namely, raise the constitutional question by appropriate assignments of error.

Turning next to examine the cases in which the State Supreme Court reversed the decision of the lower Court, and in which therefore the appealing party here was either the defendant-in-error or appellee in the State Supreme Court, one observes that in all of these cases the constitutional question raised in the petition for re-hearing was considered by this Court. *In not a single case was the writ of error or appeal dismissed.* The explanation is simple enough. With the absence of the reason for the practice, the practice itself changes. It is therefore submitted in the case at bar that the line of decisions treating of the force and effect to be given a petition for re-hearing are in noway inconsistent with the posi-

tion of the plaintiff-in-error here, who is asking that his raising of the constitutional question in his petition for re-hearing should be regarded as complying with the pre-requisites necessary for the jurisdiction of this Court to attach. Furthermore, the cases analyzed show that wherever the constitutional question raised in a petition for re-hearing are in fact considered by the State Supreme Court and decided adversely to the party appealing here, this Court will take jurisdiction to determine such question. That the case at bar falls within the principles laid down by these cases, is evidenced by the certificate which was signed by order of the Court and made part of the Record in this case, which certifies that a claim was made in the petition for re-hearing that the judgment of the State Supreme Court constituted a violation of the prohibition of the Fourteenth Amendment to the Constitution of the United States, and that the State Supreme Court considered this claim, and decided adversely thereon.

The force and effect to be given the Certificate of the Supreme Court of Appeals as to the involution and decision of the Federal question.

The decisions of this Court show that on many occasions certificates of the State Supreme Court, or of the Chief Justice thereof, have been returned to this Court, certifying with respect to the involution of a Federal constitutional question. A table of these cases, thought to be exhaustive, is annexed.

A reference to the annexed table shows that the cases have been sub-divided according as the certificate was made by the order of the Court, or by the Chief Justice. Where the order was made by the Chief Justice, the certificate was necessarily not a part of the record, and consequently, although great respect was shown to its contents, such certificate was not allowed the full force which, as the act of the Court, and as part of the record, it would have received.

When one examines the cases where the certificate was made by the Court, and made part of the record, one observes that in four of the cases only was the writ of error or appeal dismissed, namely:

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Brown vs. Atwell, Messenger vs. Mason, Lawler vs. Walker, and Commercial Bank vs. Buckingham. The reasons for these decisions have, however, no essential application to the case at bar. In Commercial Bank vs. Buckingham, it was held that no Federal constitutional question was really involved. In Lawler vs. Walker, and Messenger vs. Mason, it was held that the constitutional question was too loosely stated for it to be considered. And in Brown vs. Atwell, an examination was made by this Court of the case, and it was held that the decision of the State Supreme Court might be upheld on grounds entirely adequate without reference to the Federal constitutional question. *In no case where the certificate was made by order of the Court and made part of the record*, was it held by this Court that the Federal constitutional question involved would not be considered. It is appreciated that the tabulated cases are not cases containing certificates respecting the decisions of the Court upon petitions for re-hearing. But there would not seem to be any controlling or significant distinction between a certificate as to what was decided by the State Supreme Court in its decision and what was decided by it in its denial of a petition for re-hearing.

The two very recent and important cases particularly in point here are those of *Marvin vs. Trout*, 199 U. S. 212 (1905) and *Cincinnati, etc., Packet Co. vs. Bay*, 200 U. S. 179, (1906).

In the former of these cases this Court says:

"A reference to the record does not show
"that any one of these questions was raised, either
"by the pleadings or on the trial of the case. The
"only evidence that any question was raised in the
"Supreme Court, assailing the validity of the
"statute as a violation of any provision of the
"Federal Constitution, consists of a statement in
"the petition in error to the Supreme Court, that
"the statute was a violation of certain sections
"of the Federal Constitution, and in the certificate
"of the Supreme Court of Ohio, which that Court
"ordered to be made a part of the record, and
"which is above set forth. It is a certificate from
"the court as distinguished from one by an in-
"dividual judge.

"The petition in error does not show that
"any question involving the Federal Constitu-
"tion was actually argued or brought to the at-
"tention of the Supreme Court. It is well settled,
"in this court, that a certificate from a presiding

"judge of the state court, made after the decision
"of the case in that court, to the effect that a
"Federal question was considered and decided by
"the court adversely to the plaintiff-in-error,
"cannot confer jurisdiction on this court, where
"the record does not otherwise show it to exist;
"that the effect of such a certificate is to make
"more certain and specific what is too general and
"indefinite in the record itself, but it is incompe-
"tent to originate the Federal question. *Dibble vs.*
"*Bellingham Bay Land Co.*, 163 U. S. 63; *Henkel*
"*vs. Cincinnati*, 177 U. S. 170; *Fullerton vs.*
"*Texas*, 196 U. S. 192. As the certificate in the
"case at bar was made by the court, and was
"ordered by it to be attached to and form part of
"the record itself, it is perhaps sufficient to show
"that some questions of a Federal nature were
"before that court and decided by it." (at pp. 222-
223).

In the case at bar, as in this case of *Marvin vs. Trout*, the certificate was made by the Court, and was ordered by it to form part of the record. Taken in connection with the original opinion of the Court, it shows that the Federal constitutional question was presented and insisted on by Walter H. Taylor,

Trustee, and considered and decided adversely by the Court. The language quoted above sums up the conclusion of the long line of cases discussing similar certificates.

In the case of *Cincinnati, etc., Packet Co. vs. Bay*, 200 U. S. 179 (1906), This Court says of the judgment entered by the State Supreme Court:

"No opinion was delivered, but a certificate that this objection was relied upon and that it necessarily was considered was made part of the record by that court. Therefore the present writ of error properly was allowed. The record shows that the question was raised and the certificate shows that it was not treated as having been raised too late under the local procedure, a point upon which the state court is the judge. It is enough that the Federal question was raised and necessarily decided by the highest court of the State." (at p. 182).

(c). It has become an elementary principle of practice in this Court that where the opinion of the State Supreme Court discusses the Federal constitutional question involved and decides against

a party claiming a constitutional right, the evidence is considered to be sufficient that the Federal question was raised in the Court below and decided adversely to the appellant or plaintiff-in-error in this Court.

An examination of the opinion of the Supreme Court of Appeals of Virginia, made part of the record, shows that the whole question of the rights of Walter H. Taylor, Trustee, with respect to his obtaining damages for the value of the improvements put upon his land was disposed of by quotations from the work of Lewis on Eminent Domain. That quotation shows by its reasoning and by the language used that the constitutional provision requiring as part of due process of law that just compensation should be made was in the mind of the Supreme Court of Appeals of Virginia.

The quotation from Lewis reads:

"The proceeding to ascertain a just compensation to be paid for property taken for public use is not a common law proceeding. The principles to be applied are broad and liberal, and such as are just to both parties. It is just a compensation, no more and no less, which the Constitution requires to be paid. In determin-

"ing what is just, the courts are not hampered
 "by any hard and fast rules of the common law.
 "As we have already shown, just compensation
 "to the owner is an indemnity for the loss he sus-
 "tains, irrespective of the general advantages and
 "disadvantages which affect the community at
 "large. Indemnity in the case supposed does not
 "include the value of works prematurely placed
 "upon the property. The owner has not lost
 "the value of such works, but if their value is
 "given to him, it is so much in excess of his loss,
 "which is something never contemplated by the
 "constitution." (Record, p. 132.)

This is a distinct consideration of a question of
 constitutional law. True it is that the Supreme
 Court of Appeals of Virginia did not by express lan-
 guage state their opinion of the effect of what
 they said upon a case like the one at bar, where the
 right to condemn was given *after* the title to the
 improvements had attached to the free-hold, but
 this would seem to be immaterial. The Supreme
 Court of Appeals, in the quotation from Lewis, de-
 clare that the constitutional provision has no ap-
 plication. The fact that in many cases it may have

no application would seem to be immaterial; the important thing is that in the case at bar the constitutional question was considered and decided not to protect Walter H. Taylor, Trustee. The fact of its consideration shows that it was argued, the fact of the decision shows that the determination was against the contention of Walter H. Taylor, Trustee. If any doubt could be raised as to this being the meaning of the quotation from the Court, that doubt is removed by the certificate ordered by the Court to be made part of the Record. It has never been questioned by this Court that such a certificate operates "to make more certain and specific what is too general and indefinite in the Record."

In conclusion, it is respectfully urged that the record in this case shows that the judgment entered by the State Appellate Court, of its own motion, contravenes the provisions of the Fourteenth Amendment

and takes the property of Walter H. Taylor, Trustee, without due process of law. It is not a State statute which is sought to be annulled because of unconstitutionality, but a State act, done by its instrumentality, the State Supreme Court. That act was done, it is submitted, under an erroneous conception of law, which conception results in depriving Walter H. Taylor, Trustee, of his property without due process of law. It is the exact case referred to as matter of illustration in this Court when it was said that this Court would review a rule of law laid down by the State Court claimed to contravene the Fourteenth Amendment. A reversal of this erroneous judgment does not carry with it the declaration of the unconstitutionality of any statute; it serves only to maintain the rights of Walter H. Taylor, Trustee. The peculiar situation created by the entry of such a judgment, creates also a peculiar condition of the record; but, it is submitted that on the authorities, and, above all, on the reason underlying the applicable principles of practice, there has been a denial by the State Court of constitutional rights after the same have been brought to its attention.

CHARLES H. BURR,
Attorney for plaintiffs-in-error.

No. 152.

October Term, 1912.

IN THE

Supreme Court of the United States.

**CONSOLIDATED TURNPIKE COMPANY, ARTHUR W. DEPUE,
and WALTER H. TAYLOR, Trustee,**

PLAINTIFFS IN ERROR,

VS.

NORFOLK & OCEAN VIEW RAILWAY COMPANY,

DEFENDANT IN ERROR.

**In Error to the Supreme Court of Appeals of the
State of Virginia**

SUPPLEMENTAL BRIEF ON BEHALF OF THE PLAINTIFFS IN ERROR.

Upon the subject of the jurisdiction of this court, it is not thought that anything can profitably be added to the main brief for plaintiffs in error. Upon the merits, the brief of defendant in error raises several points not discussed with fullness in the main brief of plaintiffs in error, which points are considered in this supplemental brief.

The argument on behalf of the plaintiffs in error on the merits is divided into three heads. Plaintiffs in error maintained (A), main brief, pages 25-29, that Walter H. Taylor, trustee, had not received a due and proper hearing on the adequacy of the award made by the Court of Appeals. On this point, the position of Walter H. Taylor, trustee, is somewhat misapprehended. The testimony is quoted *not* to show that the finding by the Court of Appeals was contrary to the evidence; but simply to show that it was made *without any evidence on which to base it*. It will not do to say that the commissioners formed their estimate from what they saw, because the award made by the Court of Appeals was with respect to the value *seven years* before the commissioners saw the land. *Without any testimony on this point* there was no hearing to bring the case within the due process of law clause of the Constitution.

In answer to contention (B) of Walter H. Taylor, trustee, main brief, pages 30-33, to the effect that the award was in the form of an option to the defendant in error, the defendant in error replies that its possession is *not* "dependent upon the condemnation proceedings." As a matter of fact, it did obtain a deed from the Consolidated Turnpike Company, the

mortgagor; but by means of the condemnation proceedings it has maintained possession since it filed the petition in equity in the Federal court on September 27, 1907. But does it make a vital difference how or why the defendant in error maintains possession of the land mortgaged to Walter H. Taylor, trustee? The point is, that the decree of the Supreme Court of Appeals of Virginia assumes to give an *option on this property*, and Walter H. Taylor, trustee, is held out of possession indefinitely. A decree in the form of an option, it is respectfully submitted, is not the giving of compensation in the form of due process of law.

In presenting the argument on the merits, Walter H. Taylor, trustee, urged under (C), main brief, pages 33-46, that by the terms of the decree of the Court of Appeals, he was not to be compensated for any improvements made upon the property. It is particularly upon this head that it seems necessary to consider the argument of the defendant in error. Walter H. Taylor, trustee, attempted to put into the form of three syllogisms the argument on this head. As a minor premise of the first argument, he stated: "The improvements made in case at bar, were made before Condemnation Act had been passed, when no right of condemnation existed." The argument of defendant

in error begins by the citation of a large number of authorities to the effect that improvements put upon property by a corporation having the right to condemn do not enter into the measure of damages to be thereafter awarded. It is conceded that any contention on this head is foreclosed by the decision of the State Court of Appeals in this case.

But counsel for defendant in error further attack the truth of the minor premiss above quoted and say that the right of condemnation existed when the improvements were made. Issue is therefore squarely joined between Walter H. Taylor, trustee, and the defendant in error, concerning the truth or falsity of the minor premiss. If false, it is conceded that the contention of Walter H. Taylor, trustee, upon this head must fail. If true, it must be successful.

The point is a narrow one; it comes to this: That Walter H. Taylor, trustee, as mortgagee under a corporation trust mortgage does not stand in the shoes of the mortgagor. To put the point more fully: That a provision of the Virginia law protecting public service corporations, and prohibiting the condemnation of their property by another corporation possessing the power of eminent domain, does not equally protect a trustee for bondholders under a corporation mortgage. And this, too, although the first mortgage in question conveyed to the trustees

"all corporate rights, powers and franchises to
 "the said company belonging, or in any wise
 "appertaining, with which it was invested by the
 "legislature of the state of Virginia, or in any
 "other manner, in conformity with the laws of
 "said state" [Record, p. 98],

and the general mortgage likewise conveyed the franchises of the constituent corporations [Record, p. 108.]

At the time when the improvements were placed upon this property by the predecessor of the defendant in error, the law of Virginia admittedly prevented another public service corporation from taking this property under condemnation. Is it possible to maintain that this principle of law did not protect the corporation bondholders to whom the franchises of the corporation had been pledged? that by the simple device of securing a deed from the mortgage debtor the rights of those bondholders might be condemned and their property as an entirety destroyed? The truth of the minor premiss in the series of syllogisms becomes apparent so soon as the point is clarified by a statement of the essential facts. The following quotation from the petition for a writ of error filed in the Supreme Court of Appeals by the defendant in error herein is interesting in this connection:

"The property sought to be acquired by condemnation was the property of a public service

“corporation—the Consolidated Turnpike Com-
 “pany—and neither the receivers nor any cor-
 “poration can, in Virginia, take by condemnation
 “proceedings any property belonging to another
 “corporation possessing the power of eminent
 “domain, ‘unless after hearing all parties in
 “interest the State Corporation Commission
 “shall certify that a public necessity or that an
 “essential public convenience shall so require,
 “and shall give its permission thereto.’ No hear-
 “ing was had by the Corporation Commission;
 “consequently no certificate was issued, nor per-
 “mission granted.” [Record, pp. 7-8.]

Defendant in error proceeds, however, to urge that in some way Walter H. Taylor, trustee, has waived this question. It is perfectly true that Walter H. Taylor, trustee, did not insist that permission to condemn should first be obtained from the Public Service Corporation Commission under the act of 1903. (See Appendix, p. 8.) He simply submitted himself to the jurisdiction of the court to determine proper compensation in accordance with the statutes of Virginia, and the provisions of the Constitution of the United States. The fact that he waived the prerequisite of an application to the Corporation Commission has, it is submitted, nothing whatever to do with his insisting on the proposition of law that prior to the passage of this act he was protected by the

law of Virginia, and that the improvements placed upon the property became by the law of Virginia security under his mortgage. Defendant in error urges: "The plaintiff in error cannot now be heard "to complain that these proceedings were against a "public service corporation." Walter H. Taylor, trustee, does not so complain. He admits it. He waives any objection to the condemnation being prosecuted on account of that fact. He urges, however, that it is a fact, that it was a fact before the act of 1903 was passed, and remains a fact. He says, that although he is willing that defendant in error should not comply with the statutory pre-requisite to beginning condemnation, that has nothing whatever to do with the measure of damages to which he is entitled in such condemnation. His waiver surely goes no further than to placing the defendant in error in the position which it would have occupied had it obtained permission to begin condemnation from the State Corporation Commission. If it had had such permission, in what possible way could that affect the title to the improvements which had vested in Walter H. Taylor, trustee, before the passage of the act creating the State Corporation Commission?

Respectfully submitted,

CHARLES H. BURR,

Attorney for Plaintiff in Error.

APPENDIX.

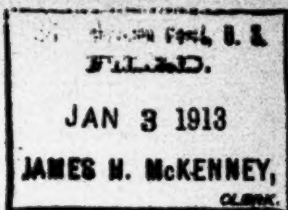
For the convenience of the court, the section of the Virginia Code referred to is hereto appended.

Code of Virginia, 1904, Sec. 1105e, Par. 52, being Section 52 of Chapter V of "An act concerning Corporations," which became a law on May 21, 1903 (Laws of 1902-3-4, p. 481):

"When corporation may condemn property of other corporation:

"No corporation shall take by condemnation proceedings any property belonging to any other corporation possessing the power of eminent domain, unless, after hearing all parties in interest, the State Corporation Commission shall certify that a public necessity or that an essential public convenience shall so require, and shall give its permission thereto; and in no event shall one corporation take by condemnation proceedings any property owned by and essential to the purposes of another corporation possessing the power of eminent domain."

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No. 152. October Term, 1912.



IN THE

Supreme Court of the United States

**Consolidated Turnpike Company,
Arthur W. Depue, and Walter
H. Taylor, Trustees**

Plaintiffs in error

VS.

Norfolk and Ocean View Railway Company,
Defendant in error

**In error to the Supreme Court of Appeals
of the State of Virginia**

Reply Brief on Behalf of Defendants in Error

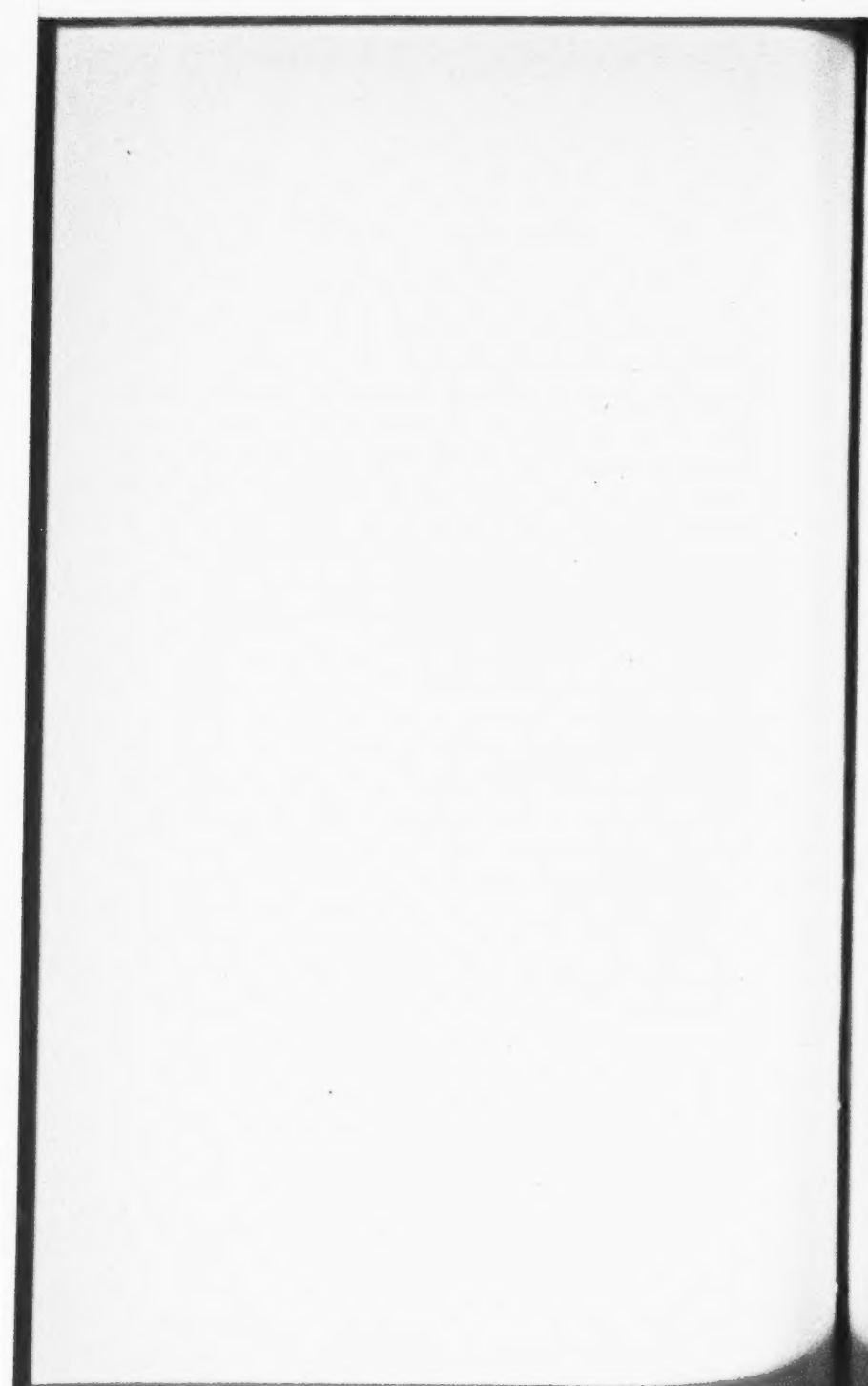
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No. 152. October Term, 1912

IN THE

Supreme Court of the United States

**CONSOLIDATED TURNPIKE COMPANY, ARTHUR
W. DEPUE AND WALTER H. TAYLOR,
TRUSTEES,**

PLAINTIFFS IN ERROR,

VS.

**NORFOLK & OCEAN VIEW RAILWAY COMPANY,
DEFENDANT IN ERROR.**

**IN ERROR TO THE SUPREME COURT OF APPEALS OF THE
STATE OF VIRGINIA.**

REPLY BRIEF ON BEHALF OF DEFENDANTS IN ERROR.

STATEMENT OF FACTS

Before proceeding to the argument of the questions presented, we deem it desirable, if not necessary, to present a statement of this case which will include material facts which have been overlooked, and correct certain errors which appear, in the statement of the case in the brief presented on behalf of the plaintiffs in error.

In opening the statement of the case in the brief filed on behalf of the plaintiffs in error it is stated that the case comes before this court on a writ of error to the Supreme Court of Appeals of the State of Virginia involving the question whether or not certain condemnation proceedings had in the courts of that State deprived the plaintiff in error, Walter H. Taylor, Trustee, of his property without due process of law, contrary to the provisions of the fourteenth amendment to the Constitution of the United States.

The condemnation proceedings in question were necessary in behalf of a public service corporation which had entered upon and improved certain property under grant of title from the party entitled to possession but was subsequently threatened with loss of its possession and title through foreclosure of a mortgage previously made by its grantor.

The Commissioners in the condemnation proceedings made their report in the alternative, presenting to the court the question as to which award should be confirmed; the alternative awards being dependent upon the question as to whether the condemning party which had entered into possession not as a trespasser but with permission of and under deed of grant from the party entitled to possession, should be made to pay in the condemnation proceedings not only the value of the land but the value of improvements which it, the condemning party, had placed upon the premises. (Record, pp. 49, 50.)

The Circuit Court of the State held that the condemning party should pay the price of the improvements which had been

put upon the property subsequent to its occupancy under the grant named. (Record, pp. 55, 6, 7.)

The Supreme Court of Appeals of Virginia reversed the lower court and held that the proper measure of damages was the value of the land without considering the value of improvements put thereon by the condemning party. (See Opinion, Record, p. 127; final judgment, Record, p. 135.)

Some months after the Supreme Court of Appeals of Virginia had entered judgment such as it declared the lower court should have entered, the plaintiffs in error filed a petition for rehearing in which, for the first time, was it suggested that there was any Federal question involved in the final judgment of the court. (Record, p. 136.) Thereafter the following order in said cause upon the petition for rehearing was entered:

"Upon the petition of the appellee by counsel for the rehearing of the decree entered by this court in this cause at its place of session at Wytheville on the 9th day of June, 1910.

"This day came again the appellant by counsel and the court having maturely considered the petition aforesaid, the same is denied." (Record, p. 143.)

The effect of this order was to deny a hearing upon the constitutional questions raised for the first time by the petition for a rehearing.

The conditions under which the issues now presented to this court have been made and brought here may be stated in detail as follows:

In the year 1900 the Consolidated Turnpike Company was organized under the laws of the State of Virginia and acquired by consolidation and merger a number of turnpike roads adjacent to the city of Norfolk, including the turnpike road of the Tanners Creek Drawbridge Company, and thereupon said Consolidated Turnpike Company issued a mortgage or deed of trust to Walter H. Taylor, Trustee, to secure an authorized issue of \$200,000.00, par value of its bonds. Part of the bonds authorized by this mortgage were issued and are now outstanding.

Thereafter the Bay Shore Terminal Company was incorporated and, pursuant to its charter, undertook to construct an electric railway in the City of Norfolk and from the City of Norfolk to Ocean View, a part of its projected right of way being a strip of land constituting a part of the original right of way of the turnpike of the Tanners Creek Drawbridge Company and then a part of the property of the Consolidated Turnpike Company. Under these conditions, the Bay Shore Terminal Company entered into a contract with the Consolidated Turnpike Company to purchase the strip of land belonging to the Consolidated Turnpike Company and desired as a part of the right of way of the Bay Shore Terminal Company. By deed dated the 1st day of March, 1902, duly executed and delivered, the Consolidated Turnpike Company conveyed, with general warranty, unto the Bay Shore Terminal Company, a strip of land 18 feet wide extending from Norfolk City Park to Tanners Creek and a strip of land 25 feet wide extending the whole length of the road from Tanners Creek to Ocean View, and also a tract of land upon which

the power house of the Bay Shore Terminal Company was subsequently located. (Record, p. 114.)

The consideration of this deed, certain bonds and capital stock of the Bay Shore Terminal Company, was paid and thereupon the Bay Shore Terminal Company entered upon said right of way and constructed its electric railway and power house.

At the time of this grant there was outstanding against all the property of the Turnpike Company, including the turnpike, a portion of which was conveyed in said deed, the mortgage indebtedness referred to—to-wit, that secured under the deed of trust or mortgage to Walter H. Taylor, Trustee.

The deed from the Turnpike Company to the Terminal Company, in order to meet this situation, provided that the bonds and stock of the Terminal Company, recited as a part consideration for the conveyance, should be delivered to said Walter H. Taylor, Trustee, in order to secure a release from the said mortgage of the land conveyed to the Terminal Company. These securities were delivered into the possession of the Trustee but no release of record was ever secured.

The Bay Shore Terminal Company soon came to grief, and in October, 1903, the Circuit Court of the United States for the Eastern District of Virginia appointed receivers for that corporation in a suit under the style of *Fink vs. Bay Shore Terminal Company and others*.

Matters in issue in the receivership were referred to a special master, who reported that the title to the right of way of the Bay Shore Terminal Company was encumbered by the

deed of trust mentioned and other liens, but called attention to the provision in the deed for the delivery of the securities to the Trustee and stated that in his opinion "ample consideration for a good, sufficient and proper title to said right of way and parcel of land" had been made and that there was no further obligation on the part of the Terminal Company to the Turnpike Company, and recommended that the receivers of the Bay Shore Terminal Company be required to demand of the Turnpike Company such action on its part as would release said right of way, and in the event that the Turnpike Company, failed to furnish proper release that the receivers should be directed to acquire proper title by condemnation proceedings or otherwise. (Record, p. 121.)

By order entered the 20th day of January, 1906, the Circuit Court of the United States for the Eastern District of Virginia directed its receivers to institute condemnation proceedings. (Record, p. 21.)

On the 3rd day of March, 1906, the receivers, pursuant to the direction of the court, instituted condemnation proceedings by filing a petition in conformity with the statute law of Virginia and gave notice by personal service and by publication to all parties in interest; notice being personally served upon Walter H. Taylor, Trustee. (Record, p. 21.)

A demurrer and answer to the petition in condemnation proceedings was filed by Arthur W. Depue, one of the plaintiffs in error, who came into the proceedings as a party interested, alleging that he was the owner of \$90,000 par value of the bonds of the Consolidated Turnpike Company. (Record, p. 30.)

Walter H. Taylor, Trustee, though personally served with notice, did not appear on the return day of the notice. (Record, p. 27.)

On the 13th day of May, 1906, the Commissioners filed their report, in which they made the alternative award, saying in effect—first, that if the property should be valued as of the time of their investigation and assessment, without improvements, the amount of \$6,200 was full compensation; second, that if they were to consider the land and the improvements which had been placed thereupon by the Bay Shore Terminal Company, the amount of compensation should be \$57,200. (Record, p. 49.)

Upon the filing of this report, Arthur W. Depue filed exceptions and objections thereto (Record, pp. 52, 53), but Walter H. Taylor, Trustee, did not then appear.

While the condemnation proceedings were pending the Circuit Court of the United States for the Eastern District of Virginia, on March 17, 1906, entered a decree in the receivership proceedings ordering the property of the Bay Shore Terminal Company to be sold for the payment of the debts of that company and, pursuant thereto, the sale was made and confirmed, the purchaser being the Norfolk & Ocean View Railway Company, and the property of the Bay Shore Terminal Company was conveyed to said Railway Company. Said conveyance, in accordance with the decree of the court, provided the grantee took said property with the benefit of and subject to all suits and proceedings which may have been or may be instituted by said receivers.

While the decree ordering the sale was entered in March, 1906, owing to litigation in the premises and objections to the sale and confirmation the sale was not confirmed nor deed made until February, 1907.

Not until June 1, 1909, three years after the report of the Commissioners had been filed in the condemnation proceedings, were any proceedings had therein beyond the report of the Commissioners aforesaid.

Immediately after the sale and conveyance of the property of the Bay Shore Terminal Company to the Norfolk & Ocean View Railway,—that is to say, on the 18th of March, 1907,—Arthur W. Depue, one of the plaintiffs in error herein and the principal bondholder of the Consolidated Turnpike Company and as such appearing in the condemnation proceedings, objecting to the same, secured a judgment against the Consolidated Turnpike Company by confession of its president, H. L. Page, and thereupon made application to the Circuit Court of Norfolk County for the appointment of a receiver of the Turnpike Company and the foreclosure of the deed of trust of the Turnpike Company to Walter H. Taylor, Trustee, the evident purpose of which was to deprive the purchasers of the Bay Shore Terminal Company of the possession of the portion of the turnpike occupied by the Bay Shore Terminal Company. Whereupon the Norfolk & Ocean View Railway Company filed a petition in the receivership suit pending in the Circuit Court of the United States for the Eastern district of Virginia—“*Fink vs. Bay Shore Terminal Co.*”—asking for an injunction against the prosecution of the foreclosure

proceedings against the Consolidated Turnpike Company, so far as they affected the title and possession of said Railway Company, on the ground that the Circuit Court of the United States should protect the title which it had conveyed. The injunction was granted by the United States Circuit Court and on appeal was affirmed by the United States Circuit Court of Appeals.

After the Circuit Court of Appeals had affirmed the Circuit Court in its injunction, Arthur W. Depue and Walter H. Taylor, Trustee, returned to the condemnation proceedings, and in view of the repeated assertion in the statement of facts as well as in argument in the brief on behalf of the plaintiff in error to the effect that Walter H. Taylor, Trustee, has never had the opportunity to consider the possibility of the confirmation of the alternative award giving compensation for the land without improvements, the attention of the court is especially called to the exceptions to the report of the commissioners filed by Arthur W. Depue (Record, pp. 52-3) and the order of the Circuit Court of Norfolk County entered on the 6th day of August, 1909 (Record, pp. 55-6), in which order of the court is contained the following recital of fact:

"Said Arthur W. Depue having heretofore formally waived the exceptions numbered 1, 2, 3, 4, 5, 6, 7, 8, and 16 of the said Arthur W. Depue, to the report of the Commissioners filed in this cause *and Walter H. Taylor, trustee under mortgages and deeds of trust securing the bonds of the said Arthur W. Depue, having joined with the said Arthur W. Depue in waiving and abandoning the aforesaid objections and excep-*

tions, this cause came on this day again to be heard on the report of the commissioners filed herein on the 29th day of June, 1906, and exceptions thereto." (Italics ours.)

This statement, taken in connection with the exceptions thereto, that is the exceptions not withdrawn by said Depue and Walter H. Taylor, expressly brings to the court the issue as to which of the alternative awards should be confirmed, and further the question as to the inadequacy of the award of \$6,200, should the court be of opinion that the value of the improvements should not be considered.

Upon the motion of Arthur W. Depue and Walter H. Taylor, Trustee, to confirm the award of the Commissioners allowing compensation for improvements, the Norfolk & Ocean View Railway Company asked for dismissal of the proceedings based upon grounds which seemed to it to affect the validity of the title which it might acquire under said proceedings. These objections were overruled. The motion to confirm the award allowing compensation for improvements was insisted upon by Arthur W. Depue and Walter H. Taylor, trustee, while the Norfolk & Ocean View Railway Company urged upon the court the confirmation of the award making compensation for the land without improvements, as will appear from the statement of the court (Record, p. 58), as follows:

"The exceptions filed by Arthur W. Depue have been withdrawn, and he is asking that the report awarding compensation for the said right of way and

land, including the improvements, be confirmed. This motion is opposed by the plaintiffs, who insist that if either report is to be confirmed only that one should be confirmed which awards compensation for the land and right of way without the improvements."

In view of this statement by the court below, it is manifestly incorrect to say that no opportunity has been given in this cause for Walter H. Taylor, Trustee, to present evidence as to the inadequacy of the award.

Upon the issue as presented in the Circuit Court of Norfolk County, that court on the 6th day of August, 1909, entered an order confirming the award of the Commissioners which fixed the compensation for the value of the land and the improvements thereon at \$57,200, and directed that interest should be added to said sum from the date of the entry of said order.

From this action of the Circuit Court of Norfolk County, the Norfolk & Ocean View Railway Company appealed to the Supreme Court of Appeals of Virginia, and as ground for its petition alleged numerous assignments of error.

The Norfolk & Ocean View Railway Company presented for the consideration of the Court of Appeals the same objection to the validity of the proceedings which it had presented in the court below.

The sixth assignment of error urged in the Supreme Court of Appeals of Virginia, was as follows:

"The court, if it had jurisdiction to act upon the report, should have confirmed the award which did

not include the value of the improvements placed upon the property by the Bay Shore Terminal Company with the consent of the Consolidated Turnpike Company." (Record, p. 13.)

So that it is not true, as alleged in the statement of facts in the brief on behalf of the plaintiffs in error, "that at no time did the defendants in error endeavor to have any award in any amount confirmed, that the whole effort of counsel was to procure a dismissal and vacating of the condemnation proceedings as entered."

It will also appear that the argument on this sixth ground or assignment in the petition for an appeal presented the substantial issue in this case and the opinion of the Supreme Court of Appeals of Virginia clearly shows that it recognized that this was the real and substantial question in the case.

Interest was allowed by the lower court upon the amount of the award from the date of the entry of the order, and no objection was made by Arthur W. Depue or Walter H. Taylor, Trustee, as to this provision for interest. It will appear from the record that the period for the allowance of interest was fixed on motion of Walter H. Taylor and his co-plaintiff in error, Depue, and cannot be affected now by an allowance of a different principal sum by the court.

As appears from this recital of facts, it is not true that the Supreme Court of Appeals of Virginia entered of its own motion a judgment confirming the alternative award, for it was urged both in the trial court (Record, p. 58), as well as before the Supreme Court of Appeals of Virginia, that

if any award should be confirmed, the award based upon the value of merely the land without improvements should be the award confirmed. Not only was this urged in both the trial court and in the Supreme Court of Appeals, but the question was presented in the exceptions to the Commissioner's report filed by Arthur W. Depue, which were adopted by Walter H. Taylor, Trustee, and which were expressly presented and considered by the trial court.

The final judgment of the Supreme Court of Appeals of Virginia was entered on the 10th day of June, 1910.

On the 6th day of September, 1910, the petition for rehearing, which is found at page 136 of the record, was filed. And for the obvious purpose of securing an appeal to the Supreme Court of the United States, the following statement was included in the petition; raising for the first time the alleged Federal question now urged in this court:

"It is further urged that the fact that the Terminal Company had no right of eminent domain over the property of the Turnpike Company when the improvements were erected, renders any taking under a subsequent statute of the rights of the appellees theretofore acquired, a taking without due process of law in violation, not only of the Constitution of Virginia, but of the fourteenth amendment to the Constitution of the United States. The statement of the facts is the strongest argument. Before the passage of the present condemnation act, the improvements had become subject to the mortgage lien of the appellees; after the passage of the statute, and by its authority, ap-

pellants took the property with the improvements. If they do not pay for the improvements so taken, then they take property without due process of law. The fourteenth amendment has been construed as applicable to condemnation cases and is directly in point here." *Chicago and Quincy R. R. vs. Chicago*, 166 U. S. 226.

On the 14th day of December, the Supreme Court of Appeals of Virginia entered the following order:

"Upon the petition of the Appellee, by counsel, for a rehearing of the decree entered by this court in this cause at its place of session at Wytheville, on the 9th day of June, 1910.

"This day came again the Appellant, by counsel, and the court having maturely considered the petition aforesaid, the same is denied."

Thereafter on the 14th day of October, 1910, the Honorable James Keith, President of the Supreme Court of Appeals of Virginia, certified that in the petition for rehearing, it was claimed that the decision or judgment of the court was in violation of the fourteenth amendment to the Constitution of the United States, and further

"that this court refused the said petition for a rehearing on the ground *inter alia* that the decree or decision of this court, made as above set forth, did not constitute a taking of the property of the defendants in error without due process of law, in violation of the fourteenth amendment to the Constitution of the United States," etc.

ARGUMENT

The two questions presented in this record, we submit, are:

First. Has this court jurisdiction of the writ of error to the Supreme Court of Appeals of Virginia, where it appears that the alleged Federal question was first raised after final judgment, by a petition for a rehearing which was denied without opinion?

Second. Did the Supreme Court of Appeals of Virginia rely upon a correct rule of law in declaring that where a corporation clothed with power of eminent domain lawfully enters into the possession of land for its purposes and places improvements thereon and afterwards institutes condemnation proceedings to cure a defective title or to extinguish the lien of a deed of trust, it is not proper in ascertaining just compensation for such land to take into consideration the value of such improvements?

THIS COURT HAS NO JURISDICTION

It is respectfully submitted that the writ of error from this court should be dismissed, and for the defendant in error it is asked that this be done, as this court is without jurisdiction, the record in the case presenting no Federal question, The Federal question sought to be injected was first presented in the petition for a rehearing to the Supreme Court of Appeals of Virginia after final judgment had been entered. The petition was denied without opinion in the order stating: "The court having maturely considered the petition aforesaid, the same is denied." (Record, p. 143.)

In the brief filed on behalf of the plaintiff in error, page 56, is the following statement:

"True it is that as a general and almost universal proposition of practice, it is too late to raise by a petition for rehearing a Federal constitutional question, but it is submitted that this case is in this regard *sui generis*."

As stated by this court in *McCorquodale vs. Texas*, 211 U. S. 432:

"This court has decided many times that it is too late to raise a Federal question for the first time in a petition for rehearing in the court of last resort of a State after that court has pronounced its final decision. *Loeber vs. Schroeder*, 149 U. S. 580; *Pim vs. St. Louis*, 165 U. S. 273. It is true that we have also

decided that, if the court entertains the motion and passes on the Federal question, we will review its decision. But it must appear that the court has done so. *Mallett vs. North Carolina*, 181 U. S. 589; *Leigh vs. Green*, 193 U. S. 79; *Corkran Oil and Development Co. vs. Arnaudet*, 199 U. S. 182; *Fullerton vs. Texas*, 196 U. S. 192; *McMillen vs. Ferrum Min. Co.*, 197 U. S. 343. It can hardly be said to so appear in the case at bar. The order of the court is nothing more than a denial of the motion. In other words, it expresses no more than would be implied from a simple denial of the motion."

In the later case of *Forbes vs. State Council*, 216 U. S. 396, which was in error to the Supreme Court of Virginia, the precise question was raised, the order denying the petition for rehearing being in the very same words as the memorandum referred to in the case from which we have just cited. In the case of *Forbes vs. State Council*, the order entered by the Supreme Court of Appeals of Virginia in passing upon the petition for rehearing, is as follows:

"On mature consideration of the petition of the plaintiffs in error, to set aside the judgment entered herein on January 16, 1908, and to grant a rehearing of said cause, the prayer of said petition is denied."

In the case at bar, in passing upon the petition for rehearing, the Court of Appeals entered the following order:

"Upon the petition of the appellee, by counsel, for a rehearing of the decree entered by this court in this cause at its place of session at Wytheville on the 9th day of June, 1910.

"This day came again the appellant, by counsel, and the court having maturely considered the petition aforesaid, the same is denied." (Record, p. 143.)

In the Forbes case this court said:

"But, it is alleged, the memorandum which we have quoted shows that the Virginia court must have considered and passed upon the Federal question made in the petition for a rehearing. Except that the order is said to be upon 'mature' consideration, it is almost word for word with the order on rehearing reviewed in *McCorquodale vs. Texas*, 211 U. S. 432, which is held to be no more than a denial of the motion. (See 211 U. S. 437.) In that case the rule was again laid down that it was too late to raise a Federal question upon a petition for rehearing, unless the Federal question was passed upon in ruling upon the petition."

It is claimed by the plaintiffs in error that while the order of the court denying the petition for rehearing fails to present the Federal question, yet it is shown by a certificate of the presiding judge of the Supreme Court of Appeals of Virginia, made several months after the final judgment had been entered denying the petition for rehearing. The certificate of James Keith, President of the Supreme Court of Appeals of Virginia, is found at page 143 of the record. This certificate made by the president says that in the petition for rehearing—

"it was claimed, contended and alleged by said petitioners that the decision or judgment of this court rendered after the hearing in said cause whereby this

court reversed the decision or verdict of the Circuit Court of Norfolk County in favor of said defendant in error for \$57,200, the full value of the land for the condemnation of which this action was originally brought and the improvements placed thereon by the Norfolk & Ocean View Railway Company, the plaintiffs in error and their predecessors in title, Bay Shore Terminal Company, and awarded the said defendants in error only the sum of \$6,200, as the value of the land alone without the improvements, was a taking of said defendants' property without due process of law in violation of the fourteenth amendment to the Constitution of the United States because of the fact that the Bay Shore Terminal Company, the predecessor in title to the plaintiffs in error, had no right of eminent domain when the improvements were erected, rendered in taking, under a subsequent statute of the property rights of the defendant in error, a taking without due process of law, and because the decision of the lower court having been wholly in favor of the defendants in error, they had no opportunity to be heard respecting the insufficiency of the award for the amount without the improvements, which award was made by this court; that this court refused the said petition for a rehearing on the ground *inter alia* that the decree or decision of this court made as above set forth, did not constitute a taking of the property of the defendants in error without due process of law in violation of the fourteenth amendment to the Constitution of the United States and that said defendants in error were not thereby deprived of any rights under said amendment to said Constitution."

This court has repeatedly held that such a certificate cannot confer jurisdiction on this court.

In *McMillen vs. Ferrum Mining Co.*, 197 U. S. 343. Mr. Justice Brown, speaking for the court, said:

"It is sufficient for the purposes of this case to say that no Federal question appears to have been raised until the petition was filed for a rehearing. This was obviously too late, unless, at least, the court grants the rehearing and then proceeds to consider the question." Citing *Mallett vs. North Carolina*, 181 U. S. 589 and other cases previously referred to.

In *Seaboard Air Line Railway vs. Duval*, 225 U. S. 476. Mr. Justice Lurton, speaking for the court, in reference to a certificate such as that now before the court, said:

"Such a certificate is, however, not sufficient to confer jurisdiction to review the judgment of a State court under Section 709, Revised Statutes. That there was set up and denied some claim or right under the Constitution or statutes of the United States must appear upon the record, and such a certificate is only of value to make more definite or certain that the Federal right was definitely asserted or decided."

And again:

"It must appear on the face of the record that it was in fact raised, that the judicial mind of the court was exercised upon it and then a decision against the rights claimed under it. Or at all events it must appear from the record that there was necessarily present a definite issue as to the correct construction of the

act, so directly involved that the court could not have given the judgment it did without deciding the question against the contention of the plaintiff in error."

And again:

"In such cases it is thoroughly well settled that the record of the State court must disclose that the right so set up and claimed was expressly denied, or that such was the necessary effect, in law, of the judgment."

This court said in *Henkel vs. Cincinnati*, 177 U. S. 170:

"The record does not show that any Federal question was raised prior to judgment but it appears in the petition for writ of error from this court and accompanying assignments of errors. The certificate of the Chief Justice could not confer jurisdiction."

It is never the province of the certificate to give jurisdiction, but it is merely for the purpose of making more certain and specific what is too general and indefinite in the record. Thus, in *Parmalee vs. Lawrence*, 11 Wall. 36, this court said:

"If this court should entertain jurisdiction upon a certificate alone in the absence of any evidence of the question in the record, then the Supreme Court of the State can give the jurisdiction in every case where the question is made by the counsel in the argument. The office of the certificate as it affects a Federal question is to make more certain and specific what is too general and indefinite in the record and it is incompetent to originate the question within the true construction of the twenty-fifth section."

This view is reaffirmed by this court in *Dibbel vs. Bellingham Bay Land Company*, 163 U. S. 63.

The precise question presented in the case at bar was decided by this court in *Fullerton vs. State of Texas*, 196 U. S. 192. In this case, the Chief Justice, speaking for the court, said:

"Some weeks after the denial of the motion for a rehearing, this writ of error was allowed by the presiding judge of the court of criminal appeals, who certified that on the motion it was contended 'that, under the evidence in the cause, plaintiff in error was engaged in interstate commerce and commerce between different States within the meaning of Article I, Section 8, of the Constitution of the United States, and that the statutes of the State of Texas could not make such matters and transactions an offense, and that to do so would violate said constitutional provision.' And further, 'that said contention was duly considered by us and decided adversely to plaintiff in error.'

"But, on the face of the record proper, and from the opinions, the reasonable inference is that the court may have denied the application in the mere exercise of its discretion, or declined to pass on the alleged constitutional question, in terms, because it was suggested too late; and nothing is more firmly established than that such a certificate cannot, in itself, confer jurisdiction on this court." Citing *Henkel vs. Cincinnati*, 177 U. S. 170; and *Dibble vs. Bellingham Bay Land Co.*, 163 U. S. 63.

The case at bar presents even a stronger case for dismissal inasmuch as the certificate expressly declares that there were

other reasons for refusing the petition for rehearing and it follows that the constitutional question was not necessarily passed upon.

In the brief for the plaintiff in error, the jurisdiction of this court to review the final judgment of the Supreme Court of Appeals of Virginia is sought to be maintained upon the ground: that this case being a condemnation proceeding, the final judgment necessarily involves the appropriation of property and the compensation therefor, hence upon the question of the adequacy of the award as well as the procedure in taking, there is necessarily involved the Federal question whether the defendant in such proceedings is not deprived of his property without due process of law.

This precise view was contended for by the plaintiff in error in *Osborne vs. Clark*, 204 U. S. 563, in which case Mr. Justice Holmes, speaking for the court, says:

"But the plaintiffs in error say further that the question of their rights under the Constitution of the United States necessarily was involved in a decision upon the bill and that that is enough when the validity of a State law is concerned. *Columbia Water Power Co. vs. Columbia Electric Street R. Light & P. Co.*, 172 U. S. 475; *McCullough vs. Virginia*, 172 U. S. 102. These, and similar cases, however, are not pressed to the point that, whenever it appears that the State law logically might have been assailed as invalid under the Constitution of the United States, upon grounds more or less familiar to those actually

taken, the question is open. If a case is carried through the State courts upon arguments drawn from the State Constitution alone, the defeated party cannot try his chances here merely by suggesting for the first time when he takes his writ of error that the decision is wrong under the Constitution of the United States."

If the position of the plaintiffs in error is correct, then every condemnation proceeding in the State courts where the mere question of the adequacy of the award is involved, may be presented to this court for examination and review. There is no doubt but that this court may upon an appeal, properly presented, review proceedings had in the State courts under State authority in the appropriation of private property for public uses to determine whether there has been the due process of law guaranteed under the fourteenth amendment to the Federal Constitution. This is recognized and affirmed in *Chicago &c. R. Co. vs. Chicago*, 166 U. S. 226, but it has been nowhere declared by this court, and it is hardly to be conceived that it will declare that the mere existence of the issue as to the amount of the award to be paid in the appropriation of property will give the court jurisdiction. The extent to which the jurisdiction will be exercised in condemnation proceedings is summed up by this court in the case just cited, as follows:

"We are permitted only to enquire whether the trial court prescribed any rule of law for the guidance of the jury that was in absolute disregard of the company's right to just compensation.

"We say, 'in absolute disregard of the company's right to just compensation,' because we do not wish

to be understood as holding that every order or ruling of the State court in a case like this may be reviewed here, notwithstanding our jurisdiction, for some purposes, is beyond question. Many matters may occur in the progress of such cases that do not necessarily involve, in any substantial sense, the Federal right alleged to have been denied, and in respect of such matters, that which is done or omitted to be done by the State court may constitute only error in the administration of the law under which the proceedings were instituted."

In a more recent expression of this court in *Appleby vs. Buffalo*, 221 U. S. 521, after quoting from the case just cited, this court said:

"The question of what amounts to due process of law in cases of this character came again before this court in the case of *A. Backus, Jr. and Sons vs. Fort Street Union Depot Co.*, 169 U. S. 557. In summing up the essentials of due process of law in condemnation cases, the court said: 'All that is essential is that, in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation; and when this has been provided, there is that due process of law which is required by the Federal Constitution.' * * * The alleged denial of Federal right rests upon the assertion that the damages were nominal, while the property taken was of greater value. But, as this court has heretofore held, if the State has provided adequate machinery for the ascertainment of compensation, upon notice and hearing, and the record discloses no ruling of law which prevented compensation to the owner for the property taken, there is no lack of due process."

It will appear from an examination of the record in this case that the procedure in the State courts gave ample opportunity for hearing and for ascertaining the amount of compensation for the property taken. This being true, the amount or adequacy of the compensation is not subject to review by this court.

On page 58 of the brief of the plaintiff in error, it is stated that this court has not in a single case dismissed a writ of error or appeal for want of jurisdiction where the decision of the State court was adverse to the defendant in error or the appellee in that court and the Federal question was raised for the first time by such defendant in error or appellee by petition for rehearing in the State court.

An examination of the long table of cases cited by counsel for the plaintiff in error, following page 56 of the brief, shows that only three cases are cited in which this state of facts exists. We will not undertake to digest the numerous cases cited by counsel, but a reference to the three cases in question will show that they fail to sustain the contention of counsel that the court has jurisdiction in the case at bar.

The first case cited is that of *Disconto Gesellschaft vs. Umbreit*, 208 U. S. 570.

In this case, Mr. Justice Day, in delivering the opinion of the court after calling attention to the fact that the Federal question was first raised in the application for rehearing, saying:

"The Supreme Court of Wisconsin, in passing upon the petition for rehearing and denying the same, dealt

only with the alleged invasion of treaty rights overruling the contention of the plaintiff in error.

"It is well settled in this court, that it is too late to raise Federal questions reviewable here by motions for rehearing in the State courts. (Citing authorities.) An exception to this rule is found in cases where the Supreme Court of the State entertains the motion and expressly passes upon the Federal question." (Citing cases.)

The court then, apparently without deciding whether the Federal question had been sufficiently raised in that case says:

"Conceding that this record sufficiently shows that the Supreme Court heard and passed upon the Federal questions made upon the motion for rehearing, we will proceed briefly to consider them."

The court in this case, therefore, expressly states that the final decision of the Supreme Court of Wisconsin, on the petition to rehear, considered and passed upon the Federal question. But it does not decide that the case was properly before the court. It waives the question of jurisdiction and upon the merits decides that the Supreme Court of Wisconsin was right. The court, however, reaffirms the doctrine that the Federal question cannot be raised for the first time on a petition to rehear unless the motion or petition is entertained by the court below and the Federal question considered and decided.

The next case cited is *McKay vs. Kalyton*, 204 U. S. 458.

In the opinion, by Mr. Justice White in this case, it is said:

"True it is that the immunity which was asserted was first claimed in the petition for rehearing; but as the question was raised, was necessarily involved, and was considered and decided adversely by the State court, there is jurisdiction."

In the statement of facts prepared by Mr. Justice White, in referring to the opinion of the State court upon the petition to rehear, it is said:

"In that opinion the question whether the matter was one of exclusive Federal cognizance was elaborately considered and it was decided that it was not, because a decree as to the right of possession would not interfere with the title or trust interest of the United States."

In this case, therefore, the Supreme Court of the State entertained the petition to rehear, delivered an elaborate opinion and decided adversely upon the Federal question. The Federal question was therefore raised in the record in the court below, considered and disposed of by that court.

The only other case referred to by counsel under this head is that of *Leigh vs. Green*, 193 U. S. 179.

In this case, Mr. Justice Day said:

"The Supreme Court of Nebraska entertained the motion and decided the Federal question raised against the contention of the plaintiff in error. In such case the question is reviewable here, although first presented in the motion for a rehearing."

It will be seen, therefore, that all of the cases cited by counsel to sustain their contention are cases in which the

Federal question, though raised for the first time in the petition or motion to rehear in the State court, *was entertained by the State Court, fully considered and decided by that court.* Hence the Federal question had become a part of the record before the cause was disposed of in the court below and an opportunity had been given to argue, consider and decide the same.

In the case at bar, the question was raised for the first time in the petition to rehear, which was not entertained by the Supreme Court of Appeals of Virginia, the court merely saying that "having maturely considered the petition aforesaid the same is denied." See *Forbes vs. Grand Council*.

The reason for the denial of the petition is not stated in the order. Whether the court considered the Federal question at all or whether it regarded it as having been raised too late, is not apparent in the order of the court or the record in the cause, except that in the certificate of the president of the court it is stated that the petition was denied for reasons among others that the court regarded the Federal question raised as without merit. From this certificate, it is obvious that the petition would have been denied irrespective of the Federal question and that there were other reasons which actuated the court in this conclusion. It may have been that the controlling reason was that the court thought the question raised too late.

In any event, the petition for a rehearing was not entertained, whatever may have been the reason of the court for its action and the order of the court, which is the record

in the cause, fails to disclose that the Federal question was considered. As we point out elsewhere, the decisions of this court are unanimous to the effect that this fact first appearing in the certificate of the Court of Appeals of the State, cannot give jurisdiction to the Supreme Court of the United States.

As to the contention of counsel that the reason of the law fails in cases of this kind, it is sufficient to say that it is quite as competent for the appellee or defendant in error in the State Court of Appeals to raise the constitutional question as for the appellant to do so. The appellee or defendant in error can raise the point that to decide in accordance with the contention of the appellants or plaintiff in error would be a violation of the constitutional rights of the defendant in error or appellee, and thus bring the Federal question directly before the appellate court of the State and have it determined by that State court. The reason for the rule as to the jurisdiction of this court, therefore, applies with equal force in either case.

It is also claimed by the plaintiff in error in his brief that the jurisdiction of this court should be sustained in this case, although the Federal question was not raised until the petition for rehearing, for the reason that Walter H. Taylor, Trustee, one of the plaintiffs in error, was not given an opportunity to raise the Federal question until the judgment of the Supreme Court of Appeals of Virginia had been entered reversing the trial court.

This contention of the plaintiff in error is contradicted by the record itself.

The proceeding in this case was to condemn the outstanding mortgage lien upon property which had been conveyed to

the Bay Shore Terminal Company, predecessor in title of the Norfolk & Ocean View Railway Company by the deed of March 1st, 1902. (Record, p. 114.)

Arthur W. Depue was the holder of a large amount of the bonds outstanding under and secured by this deed of trust to Walter H. Taylor, Trustee. Their interests, therefore, were the same.

The Commissioners, after hearing evidence, filed their report (Record, pp. 49-51), in which they found that the interest or estate of all persons having any interest in or claim against or lien upon said land, whether said interest or estate, claim or lien be by deed of trust, mortgage or other lien of record, and for the other property of said owners was, as of the date of the report, of a value of \$6,200, excluding improvements thereon, and \$57,200, including improvements thereon, and submitted to the court the question of law as to whether the holders of the outstanding liens were entitled to receive compensation for the improvements placed upon the property by the Bay Shore Terminal Company while in possession under the deed from the Consolidated Turnpike Company, the mortgagor. The question of whether Walter H. Taylor, Trustee in the mortgage against the lien of which the condemnation proceedings were instituted, was entitled to recover the value of the improvements was, therefore, raised directly by this report and submitted to the court.

And the order appointing the Commissioners (Record, p. 48) directed that the report should be made in the alternative, reserving the question of law.

Walter H. Taylor was then a party defendant to these proceedings, having been personally served in the manner required by law, but he did not except to the report.

Arthur W. Depue, the owner of a large amount of bonds secured by the mortgage in which Taylor was trustee, did, however, file elaborate exceptions and objections to the report. (Record, pp. 52-54.) Among other objections, were the following:

"9. Said report is also excepted to by said Arthur W. Depue in so far as it treats the 1st day of May, 1902, as the date at which the value of the property sought to be taken is to be estimated and just compensation therefor made.

"10. Said report is also excepted to by said Arthur W. Depue in so far as it contemplates and does not include the improvements on the land on the 1st day of May, 1902, in estimating the value thereof or the compensation to be paid therefor, even if the court should be of opinion that that is the proper date as of which compensation and value is to be ascertained.

"11. It is also excepted to by said Arthur W. Depue on the ground that even if the court should be of opinion that the property herein sought to be taken should be valued as of the 1st day of May, 1902, that the compensation and value placed upon said property as of that date is grossly inadequate and not just compensation therefor.

"12. Said Arthur W. Depue also excepts to said report in so far as it contemplates and does not consider in estimating the value and just compensation

for the property herein sought to be taken the improvements of all kinds and descriptions upon said property.

"13. Said report is also excepted to by said Arthur W. Depue on the ground that the values and compensation ascertained by said Commissioners to be made for the property herein sought to be taken, if estimated as of the time of their award, is grossly inadequate and not just compensation therefor."

The matter was heard before the Circuit Court on these exceptions and various motions as disclosed by the record, and the court delivered a written opinion. (Record, pp. 58-62.) The first two paragraphs of this opinion are as follows:

"The several other matters in issue brought before the court in the above styled proceedings having been heretofore ruled upon, the question now presented for consideration and decision is which of two reports returned by the Commissioners should be confirmed, the one assessing damages for the right of way and land sought to be condemned, or the other assessing damages for the said right of way and land together with the improvements thereon, consisting of rails, ties, poles, overhead structures, buildings, power house and machinery.

"The exceptions filed by Arthur W. Depue have been withdrawn, and he is asking that the report awarding compensation for the said right of way and land, including the improvements, be confirmed. This motion is opposed by the plaintiffs, who insist that if either report is to be confirmed, only that one should be confirmed which awards compensation for the land and right of way without the improvements."

In the order of the court, filed on August 6, 1909, in accordance with this opinion, (Record, pp. 55-57) it is expressly recited that Arthur W. Depue had theretofore "waived the exceptions numbered 1, 2, 3, 4, 5, 6, 7, 8, and 16 of said Arthur W. Depue to the report of the Commissioners filed in this cause, and Walter H. Taylor, Trustee under the mortgages and deeds of trust securing the bonds of said Arthur W. Depue having joined with said Arthur W. Depue in waiving and abandoning the aforesaid objections and exceptions, this cause came on," etc.

It will thus be seen that the exceptions to the report in which Arthur W. Depue raised the question of which of the alternative awards should be confirmed and the adequacy of the compensation allowed by the report of the Commissioners were insisted upon both by Arthur W. Depue and Walter H. Taylor, Trustee, while, as stated by the court, the Norfolk & Ocean View Railway Company insisted that if either award should be confirmed it should be the award allowing a just compensation for the land without the improvements thereon.

The record thus discloses that the very question which it is now claimed Walter H. Taylor had no opportunity to raise, was, in fact, raised before the trial court except that he failed there to insist as, he had a right to do, upon his alleged Federal rights under the fourteenth amendment to the Constitution of the United States.

The Circuit Court affirmed the award allowing to the mortgagor compensation for the improvements placed upon the property by the Bay Shore Terminal Company while in

possession under the deed from the Consolidated Turnpike Company, the mortgagor. Thereupon the matter was appealed to the Supreme Court of the State. Again in that court one of the assignments of error was that if either award were to be confirmed the court below had erred in confirming the award which included the improvements instead of the award which gave compensation for the land without improvements (Record, p. 13). Here Walter H. Taylor, Trustee, had an opportunity in the argument before the Court of Appeals, where he was represented, to insist that to confirm the award for the land without improvements, as was claimed by the appellant, the Norfolk & Ocean View Railway Company, should be done, would be a taking of his property without due process of law and without just compensation and a violation of his rights under the Constitution of the United States. But he failed to make any such claim either in the trial court or in the Court of Appeals, and after having tried out his rights under the substantive law and the statutes of the State and failed to win his case, he now, for the first time, undertakes to raise a Federal question in the petition to rehear on the final judgment of the Court of Appeals, which petition that court refused to entertain.

It is submitted that upon this recital of facts without the citation of any authorities, the contention of the plaintiff in error in this court that the Supreme Court of the United States should take jurisdiction in this case on the ground that Walter H. Taylor, Trustee, had no opportunity to raise the constitutional question until the petition for rehearing, is without merit and should be rejected.

Another ground on which the plaintiff in error relies to sustain the jurisdiction of this court is in effect that the opinion of the Court of Appeals made a part of the record, shows that this constitutional question was considered by the court. The basis for this claim is that the court has referred to a quotation from Lewis on Eminent Domain as to what is just compensation required to be paid in similar proceedings. We do not think that this can be a serious contention on behalf of the plaintiffs in error. The question of compensation guaranteed by the Constitution is involved, of course, in every condemnation proceeding. If the plaintiffs in error are right in their contention, then every condemnation proceeding in which the question as to the sufficiency or insufficiency of the award is raised, may be presented to this court for examination and review. In the condemnation proceedings which this court has reviewed, it will be seen that the constitutional questions were distinctly asserted and passed upon and the jurisdiction of the court is not left to depend upon the fundamental proposition existing as the basis of all condemnation proceedings, that the owner of the property is entitled to and should receive just compensation. This is merely a matter of substantive law not involving, except in the most indirect way, any constitutional right.

UPON THE MERITS

Should this court determine that it has jurisdiction in this case, the issue on its merits is whether the Supreme Court of Appeals of Virginia has violated the fourteenth amendment to the Constitution of the United States in confirming the report of the Commissioners in condemnation proceedings which allowed to a mortgagee compensation for the land without the improvements placed thereon by the condemning party, who had entered into possession under grant from the mortgagor who was at the time of the grant entitled to the use and possession of the premises.

The specifications of error present merely the charge that the judgment of the Virginia Court of Appeals is in violation of the fourteenth amendment to the Constitution. We desire to call attention to the fact that no objection is made to the validity of the statute law of Virginia or any part thereof under which these proceedings were had nor to the regularity of any step therein, but that, on the contrary, Arthur W. Depue and Walter H. Taylor, Trustee, both plaintiffs in error, expressly waived any objection thereto. In the order or judgment of the trial court (Record, p. 55) is the following:

“Arthur W. Depue, the defendant in this cause, having heretofore abandoned formally in open court the demurrer of the said Arthur W. Depue, and all objections to the order of the court overruling said demurrer, and also having withdrawn formally all his

objections to these proceedings contained and set out in paragraph No. 7 of his answer filed to the petition in this cause, and also having withdrawn all the objections set forth to these proceedings in paragraph No. 5 of his said answer, and also having abandoned and withdrawn his exceptions to the action of the court in overruling the motion to quash these proceedings, which is made the subject of a bill of exceptions by the said Arthur W. Depue, filed in this cause on April 14, 1906, and the said Arthur W. Depue having heretofore formally waived the exceptions numbered 1, 2, 3, 4, 5, 6, 7, 8, and 16 of the said Arthur W. Depue to the report of the Commissioners filed in this cause, and *Walter H. Taylor, Trustee under mortgages and deeds of trust securing the bonds of the said Arthur W. Depue, having joined with the said Arthur W. Depue in waiving and abandoning the aforesaid objections and exceptions*, this cause this day came on again to be heard upon the report of the Commissioners filed herein on the 29th day of June, 1906," etc. (Italics ours.)

In the opinion of the trial court (Record, p. 58) in which are given the reasons for entering the order just referred to the court commences with the statement:

"The question now presented for consideration and decision is which of the awards returned by the Commissioners should be confirmed. The one assessing damages for the amount of right of way to be condemned or the other assessing damages for said land and right of way, track, buildings, power houses and machinery."

The trial court confirmed the latter award and the Court of Appeals of Virginia reversed the trial court and confirmed the former award.

We will now consider the several grounds on which it is contended on behalf of the plaintiffs in error that the effect of the final judgment of the Supreme Court of Appeals of Virginia in confirming the award of \$6,200 as the value of the interest of Walter H. Taylor, Trustee, in the right of way of the Bay Shore Terminal Company and refusing to allow compensation for the improvements placed upon the property by the Bay Shore Terminal Company, was a violation of the constitutional rights of Walter H. Taylor, Trustee, under the fourteenth amendment to the Constitution of the United States.

The first ground, as stated by counsel for the plaintiffs in error (brief p. 25), is as follows:

"A. No opportunity was afforded Walter H. Taylor, Trustee, to be heard on the adequacy of the award made by the Court of Appeals and on the legal principles controlling it."

We have already in the discussion of the jurisdiction of this court, cited at length from the record showing that Walter H. Taylor, Trustee, was before the court and had abundant opportunity to raise the question affecting his rights in the premises at every stage of the proceedings from the institution of the condemnation proceedings down to the final judgment of the Supreme Court of Appeals of Virginia. (See ante, p. 32, et seq).

We do not deem it proper to prolong this brief to repeat these citations from the record, and will now only refer to the pages of the record at which these facts may be found.

Walter H. Taylor, Trustee, was made a party to the proceedings when instituted, and notice was personally served on him. (Record, p. 27.)

He did not appear on the return day of the notice, but Arthur W. Depue, one of the plaintiffs in error before this court, and the holder of a large amount of bonds secured by the mortgage in which Walter H. Taylor was trustee, appeared, demurred and answered the petition and moved to dismiss the same.

It does not appear that Walter H. Taylor appeared personally, or by counsel, before the Commissioners to introduce evidence, but he had every opportunity to do so and cannot now complain of his own neglect.

The order of the trial court appointing the Commissioners, directed an alternative award by the Commissioners assessing the value of the right of way without improvements and the value with improvements. (Record, p. 48.) Walter H. Taylor, being a party to the proceedings, knew of the terms of this order and should have appeared and introduced evidence which would guide the Commissioners in their conclusions upon this alternative proposition. He did not do so.

Upon the filing of the report of the Commissioners, Arthur W. Depue filed exceptions and objections thereto (Record, pp. 52-53), in which (as we have seen ante p.),

the issue of the adequacy of the amount awarded as the value of the land as well as the question as to whether the value of the improvements should be considered in the compensation were directly presented. The same opportunities presented to Arthur W. Depue were presented, of course, to Walter H. Taylor, Trustee.

When the report of the Commissioners was before the court upon the motion to confirm, the entire report was, of course, before the court and in considering which of the alternative awards should be confirmed, the court necessarily considered both of these awards. The court could not reach the conclusion as to which award should be confirmed without considering the other. Then again was full opportunity given to Walter H. Taylor, Trustee, to present objections to the confirmation of the award which was confirmed in the final judgment of the Supreme Court of Appeals of Virginia.

So far, then, from having no opportunity to be heard on the adequacy of the award, it is plain from the record that Walter H. Taylor, Trustee, had the fullest opportunity to present his claims for compensation before the Commissioners who made the alternative award, before the trial court which considered the report of the Commissioners, and in the Court of Appeals of Virginia when that court had presented to it the question as to which of the alternative awards should be confirmed.

Under this particular ground alleged to support the contention that the Court of Appeals of Virginia has violated the Federal Constitution, the brief of plaintiffs in error discusses the

evidence which was taken before the Commissioners as to the value of the land and undertakes to show that upon this testimony the award was inadequate. This court has stated that upon appeal in proceedings of this character the mere amount of the award whether adequate or inadequate does not involve a constitutional question. In *Backus vs. Fort Street Union Depot Co.*, 169 U. S. 557, this court said: "All that is essential is that in some appropriate way before some properly constituted tribunal inquiry shall be made as to the amount of compensation and when this has been done there is that due process of law which is required by the Federal Constitution."

This matter was also considered in *Appleby vs. City of Buffalo*, 221 U. S. 524. In this case, Mr. Justice Day, speaking for the court, says:

"The record thus discloses that the plaintiff in error has had a hearing as to the value of his property before a board of Commissioners acting under authority of law, which order was affirmed in a reviewing court; that he was again heard in the appellate division, where that order was reversed, and was finally heard in the Court of Appeals, where the finding of the appellate division was in turn reversed. And the record fails to show any ruling of law to which an exception was properly reserved on the ground of the denial of Federal rights, which prevented the plaintiff in error from obtaining just compensation for his property."

The Supreme Court of the United States did not undertake in this case to pass upon the question of the sufficiency of the award.

Should this court consider that it has jurisdiction to review the judgment of the Court of Appeals of Virginia on the mere question of the adequacy or inadequacy of the award, we submit that upon this record, under principles heretofore declared by this court, it would not interfere with the judgment of the Court of Appeals of Virginia. In the case of *Shoemaker vs. U. S.*, 147 U. S. 306, the court said:

"The rule on this subject is so well settled that we shall content ourselves with repeating an apt quotation from *Mills on Eminent Domain*, 246, made in the opinion of the court below: 'An appellate court will not interfere with the report of Commissioners to correct the amount of damages except in cases of gross error, showing prejudice or corruption. The Commissioners hear the evidence and frequently make their principal evidence out of a view of the premises, and this evidence cannot be carried up so as to correct the report as being against the weight of evidence. Hence, for an error in the judgment of Commissioners in arriving at the amount of damages, there can be no correction, especially where the evidence is conflicting. Commissioners are not bound by the opinions of experts or by the apparent weight of evidence, but may give their own conclusions.'

The next ground given as a basis for the claim that the judgment of the Court of Appeals of Virginia in violation of the fourteenth amendment to the Constitution of the United States is thus stated (Brief, p. 30):

"B. The award as entered sustained a taking of property of Walter H. Taylor, Trustee, without requir-

ing compensation to be paid therefor; in that the possession by the Norfolk & Ocean View Railway Company has been maintained since the beginning of these condemnation proceedings to date, and the judgment simply gives to that company an option now to take or leave the property as it may desire."

The position of the plaintiff in error upon this ground has as its premise the incorrect view that the possession of the Norfolk & Ocean View Railway Company is dependent upon the condemnation proceedings. The possession of the Norfolk & Ocean View Railway Company was not based upon the condemnation proceedings nor was the right of continuance in possession by the Norfolk & Ocean View Railway Company based upon these condemnation proceedings or any award made or to be made in such proceedings. Under the statute law of Virginia relating to the right of eminent domain, no title is acquired or right to possession until the money is paid into court. The right to possession by the Bay Shore Terminal Company, the predecessor of the Norfolk & Ocean View Railway Company, was under a deed from and agreement with the Consolidated Turnpike Company.

At the time of the institution of the condemnation proceedings the receivers of the Bay Shore Terminal Company were in undisturbed possession of the property under the said grant from the Turnpike Company. There had been no default by the Consolidated Turnpike Company under the deed of trust to Walter H. Taylor, Trustee, and the Bay Shore Terminal company was in rightful and lawful possession.

The right of possession by the Bay Shore Terminal Company was complete as against the Trustee and all the world. Without the protection of the decree of the Circuit Court of the United States (Record, p. 86), by which that court undertook to protect the title and estate which had conveyed to the Norfolk & Ocean View Railway Company, the Norfolk & Ocean View Railway Company could not, by virtue of the condemnation proceedings, have maintained its possession unless it had pursuant to the Virginia statute on the subject paid the amount of the award into court. The rights and liabilities of the parties arising out of the continuance in possession, irrespective of the results in the condemnation proceedings, will be finally determined by the Circuit Court of the United States upon the issues presented in the supplementary petition and answer (Record, p. 86).

The use of that portion of the property claimed by Walter H. Taylor, Trustee, has not been by virtue of these condemnation proceedings and the judgment on the award, therefore cannot be based on that hypothesis as the judgment of the Court of Appeals of Virginia is in strict conformity to the statute as will be seen from the opinion of that court (Record, p. 127). As the Norfolk & Ocean View Railway Company has not entered upon possession or continued possession by virtue of the condemnation proceedings and while the payment or non-payment of the final judgment of the Court of Appeals may determine its right to the possession in the future, the Circuit Court of the United States must settle as between the parties the rights and liabilities respectively arising out of the possession entered into and continued by the

Norfolk & Ocean View Railway Company under deed from the Commissioners of the court and protected by the injunction of the said court.

Similar issue was presented in *Searl vs. School District*, *infra*, it being claimed there that the award should have allowed compensation for possession and use. This court said (133 U. S. p. 565):

"If he suffered injury by being kept out of possession for which he should recover damages they could not be assessed in this action and there is nothing in the record to say that any claim to that effect was made."

The third and last ground alleged in support of the plaintiff in error that the judgment of the Supreme Court of Appeals of Virginia violates the Federal Constitution is stated as follows:

"C. By the terms of the decree, Walter H. Taylor, Trustee, was not compensated for any of the improvements upon the property."

This contention presents the issue disposed of in the opinion of the trial court in favor of Walter H. Taylor, Trustee, and disposed of in the Court of Appeals of Virginia adversely to the claims of Walter H. Taylor, Trustee. The issue was earnestly pressed in both courts and presents, as we see it, the only question to be considered by this court, should the court determine that it has jurisdiction.

The Commissioners in the condemnation proceedings, pursuant to the direction of the court, made an alternative report declaring just compensation for the land if valued as of the date of the report without improvements \$6,200, and if valued as of the date of the report with improvements \$57,200. It will be borne in mind that the Bay Shore Terminal Company, whose receivers instituted the condemnation proceedings under the direction of the court, had entered into possession of this strip of land sought to be condemned, under a deed from the Consolidated Turnpike Company and that at the time of the institution of the proceedings, there had been no default by the Turnpike Company under the deed of trust to Walter H. Taylor, Trustee, but that the possession of the Bay Shore Terminal Company was undisturbed. The condemnation proceedings were undertaken under direction of the Circuit Court of the United States, not against the Consolidated Turnpike Company, but in order to clear the title of the Bay Shore Terminal Company's right of way from the lien of the deed of trust to Walter H. Taylor, Trustee, and of other encumbrances so that the improvements for which Walter H. Taylor, Trustee, claims compensation were improvements put upon the property by the condemning party not in an act of trespass, but while in possession under authority granted by deed of the Consolidated Turnpike Company, the party then in possession and entitled to possession and with the approval of—certainly without any objection by,—the Trustee who had received the consideration for the grant of the Turnpike Company. This issue and the conclusion thereon by the Supreme Court of Appeals is stated in the record (p. 133) as follows:

"We are of opinion that where a corporation clothed with the power of eminent domain lawfully enters into the possession of land for its purposes and places improvements thereon and afterwards institutes condemnation proceedings to cure a defective title or to *extinguish the lien of a deed of trust*, it is not proper in ascertaining just compensation for such land to take into consideration the value of such improvements."

This conclusion of the Supreme Court of Appeals of Virginia is supported by the decisions of this court, by the decisions of the courts of last resort in every State in which the question has been raised, and is recognized as the rule universally adopted by every text writer, so far as we have been able to determine, who has considered the question.

The opinion of the Supreme Court of Appeals of Virginia presents some of the authorities and under the sixth assignment of error in the petition for a writ of error filed in the Supreme Court of Appeals of Virginia, (Record, p. 13,) will be found cited the authorities from many States approving this view. For the convenience of this court, however, it may be well to present in this brief some of the authorities:

In *Scarl vs. School District*, 133 U. S. p. 561, this court first considered this question. In that case the premises were acquired for a public school house. The district board had knowledge of the issuing of a patent covering the property. They had purchased the claim of another party having adverse title believing it to be the better title. The building was constructed at great expense. Subsequently the title of the school district was defeated and condemnation proceedings

were commenced to acquire the title of which the school district had knowledge, but as to which they were advised that the one acquired by them was superior. Chief Justice Fuller, speaking for the court, in concluding the opinion in this case, said:

"In our judgment the technical rule of law invoked to sustain the defendant's contention that he owned the school house, was inapplicable and the value of the improvements could not be justly included in the compensation and numerous well considered decisions of the State courts announce the same result."

Lewis, in his work on Eminent Domain, which is the leading text book on this subject, says in the third edition, Section 759:

"Sec. 759. Where entry is made and works constructed before obtaining title: Persons and corporations vested with the power of eminent domain have no more right than natural persons to enter upon private property before taking the steps provided by law to obtain possession. If they do, the owner may have his common law remedies of trespass or ejectment, or he may resort to equity, and enjoin the invasion or use of his land. But, in all such cases, the persons making the entry may, by proper proceedings, condemn the property entered upon, and so perfect their right to its enjoyment and possession. The question now to be considered is, whether, in proceedings for this purpose, the owner of the land is entitled to the value of improvements which have been put upon it by the party condemning. If the entry has been made by the consent of the owner, express or implied, it is clear that the owner should not have the value of what has been

put upon the land. He has let the condemning party in for the very purpose of making these improvements, and with the expectation that the right permanently to enjoy the land with the improvements would be acquired by agreement or otherwise. The cases all concur upon this point, without much discussion of principles. In such cases the award includes all damages from the entry. Such consent may be given by the life tenant so as to bind the reversioner, *or by the mortgagor in possession so as to bind the mortgagee. If the owner brings a suit to recover the just compensation, such a suit operates as a consent to the occupation which relates back to the entry, and, upon the principles above stated, the value of the works put upon the property must be excluded in estimating the damages.* (Italics ours.)

"When the entry is made without consent, express or implied, the case presents more difficulty, but it seems clear both upon reason and authority that the owner in a proceeding to ascertain the just compensation is not entitled to the value of the works placed upon the property, though without right, for the purpose of adapting the property to the public use intended. The few cases which hold the contrary proceed upon a strict and technical application of the rule of the common law that the structures placed upon land by a trespasser become a part of the realty and cannot be removed. In a common law proceeding this rule of the common law would perhaps apply, but the proceeding to ascertain the just compensation to be paid for property taken for public use is not a common law proceeding."

In *Jones vs. New Orleans, &c., R. R. Co.*, 70 Ala. 232, Judge Bicknell, an eminent jurist, speaking for the court, said :

"The duty rested upon the appellee before the taking and appropriation of the lands, to cause in the appointed mode an ascertainment of the compensation to which the owner was entitled, and to have made payment of the compensation. Neglecting this duty, the entry upon and possession of the lands was wrongful; no title to them was acquired, and the title of the owner was not divested. The neglect of the duty, the wrongful entry and possession, does not preclude the appellee from resorting subsequently to appropriate proceedings for the acquisition of the lands, and of consequence availing itself of all the structures it may have placed thereon. *Justice vs. N. V. R. R. Co.*, 87 Pa. St.; *Secombe vs. Railroad Co.*, 23 Wall. 108. Though the appellee was a trespasser by reason of the neglect to pursue the proper remedy for acquiring the lands, acquiring them without the consent of the owner, there is in the right continuing in him, to pursue the remedy rendering the possession rightful, and by which the title may be acquired, a plain distinction between the appellee and a common trespasser. As against such trespasser the proprietor can keep the lands, and keeping them, hold the improvements he may have annexed to the soil. No remedy is given the trespasser by which he may acquire the use and enjoyment, or title to the lands. There is also another distinguishing fact. The structures of the appellee were dedicated not to the use and enjoyment of the freeholder, but to public uses, which are the consideration for the grant to the appellee for the corporate franchises, and of the right in the exercise

of these franchises to take and appropriate private property. These elements of the case distinguish it from that of the trespasser entering upon lands, fixing chattels to the freehold for his use and enjoyment, which he must intend to convert into the railroad, and which following the title to the soil as one of its incidents passed to the proprietor."

The Supreme Court of North Carolina, in a very well considered case—*Western North Carolina R. R. Co. vs. Deal*, 90 N. C., speaking through Judge Merriman, says:

"The general rule of law is that buildings and other structures erected on land for the better enjoyment of it, becomes identified as part of and go with the land, and the tenant has no right at any time to remove them. Anciently the law was more strict in respect to making things erected upon and attached to the land directly or indirectly a part of the freehold, than in modern times. As civilization has advanced and trade and mechanical arts and other industries have multiplied and increased in development, and correspondingly in their necessities and wants of reasonable conveniences, there has been a growing relaxation of the strict rules of law mentioned, in their favor. It is the policy of the law to encourage trade, manufactures and transportation, by affording them all reasonable facilities. Buildings, fixtures, machinery and all such things, certainly intended and calculated to promote them, are treated not as part of the land, but as distinct from it, and belonging to the tenant, and to be disposed of, or removed at his will and pleasure. Hence, if a house or other structure is created upon land, only for the exercise of trade, or for the mixed purpose of trade

and agriculture, no matter how it may be attached to it, it belongs to the tenant and may be removed by him during his term, and in some classes of cases after it is ended, though the tenant after his term is over, would, in coming back upon the land to get his property, be guilty of a trespass, and except in that respect the property would remain his. The exceptions to the general rule pointed out above are well settled, and the practical difficulty in any case arises in pointing out where the general rule or exception applies. The exception does not depend on the character of the structure or the thing erected, or whether it was built of one material or another, or whether it be set in the earth or upon it; but whether it is for the purposes of trade or manufacture and not intended to become identified with and part of the land." (Citing cases.)

"The right of the State to take private property for public uses, and the delegation of such right to a corporation, subject only to the constitutional limitation that just compensation shall be made, is not questioned. Under our statute the plaintiff, as such corporation, is authorized and empowered to acquire land for railroad purposes, by agreement with the owner, or failing to agree, by appropriate proceedings for its condemnation. The mode to be pursued, how and when payment is to be made, and the rights of each party, are distinctly defined, protected and secured under its provisions. In one way or the other the law must be complied with to make a valid acquisition of the right of way over the lands. If a corporation enters upon the land and appropriates it without the consent of the owner, or proper proceedings for ascertaining the compensation and making payment of the same, it renders itself liable to an action of trespass or ejectment, or to be

enjoined in equity, until compensation is ascertained and paid. (Pierce on Railroads, 168 and notes.) Still, it is the right of the plaintiff to acquire the land for its road; it is clothed with power by the State for that purpose, and the use for which it is sought to appropriate it is public and not private. In view of the rights thus delegated by the State to the corporation, the purposes for which they were conferred, and the public use for which the land is condemned, the just compensation required to be paid for its appropriation, and the great interest the public has in the successful operation of the road, it seems to us that there are elements which plainly distinguish the case of a corporation, although technically a trespasser in building a road upon land without proper authority therefor, from the case of a common trespasser in fixing chattels to the freehold, and to render inapplicable the strict rule of law which would treat such improvements as fixtures and part of the realty, or to require the law to be administered upon the just and liberal principles of the exceptions to that rule, which would accord such improvements as personality, and exclude them in computing the value of land."

Among the cases cited in the petition (Record, p. 16) we find some in which the facts show that the railroad company entered under title considered valid, and subsequently proceedings were had to acquire the title of interest outstanding, as shown by the record. In some it will appear that the railroad company entered by consent of the lessee or mere tenant in possession; in others, that it entered with the consent of the owner of the equity of redemption in possession; in some, that the railroad entered with the consent of the life

tenant, or one of several co-tenants; and in some cases with the oral consent, or without objection on the part of the real owner; but the principle as applied has been the same in all cases.

The Kansas case, with numerous others, presents facts similar to those in the case at bar; that is, the issue as between a mortgagee or party claiming under a deed of trust, and a railroad which has entered upon the property without the consent of the trustee or mortgagee, and made improvements. In the opinion in that case (*St. Louis, etc., R. R. Co. vs. Nyce*, 61 Kans. 394), the Court says:

"If condemnation had been had before the foreclosure, his rights as mortgagee would have received no consideration, and the value of the ties, track, etc., would have been wholly excluded from the amount of the award."

It will be borne in mind that in the case at bar there was no default by the Consolidated Turnpike Company at the time of the institution of these proceedings; or if there was, there was no claim being made by the trustees to foreclose, and under the statute in Virginia, in the condemnation proceedings Walter H. Taylor, Trustee, was not a necessary party, and the issue was really, and could now be confined in this case, between the Bay Shore Terminal Company and the tenant of the freehold, the Consolidated Turnpike Company; which facts but emphasize the monstrous proposition that the Bay Shore Terminal Company must pay, for the benefit of the Consolidated Turnpike Company and parties claiming under it, for improvements to the value of \$60,000, which the Bay

Shore Terminal Company put upon the property, with no purpose other than to enable it to carry out and perform a public service, an essential obligation upon which its charter and franchises were granted.

In the case last above referred to, the opinion seems to us to be well considered. A number of cases are reviewed, and we quote at length, for the convenience of the court.

After referring to a number of cases, all of which are in the list incorporated in the petition, the court said:

"The above cases are to the effect that although a railway company may enter upon land without right, and construct its track thereon, it being possessed with the continuing power of eminent domain, and having the right to secure an easement on the land upon which it has laid its track for railroad purposes, the nature of its entry and the manner in which it annexes the chattels to the soil distinguish it from the case of an ordinary trespasser making improvements to the freehold. In the case of *Cohen vs. St. Louis, Ft. S. & W. R. Co.*, 34 Kan. 158-164, 54 Am. Rep. 242, 8 Pac. 142. a railroad company had taken possession of a strip of land and constructed its track thereon, without any formal condemnation proceedings, and without procuring any title thereto, or easement therein, from the owner of the land. In an action brought by the latter against the railroad company to recover damages for the permanent taking and appropriation of such strip, no recovery was allowed for materials and work furnished by the railroad company itself and used in the construction of its track. In passing upon this question the court said: 'This question, we think, must be answered

in the negative. Of course, it must be admitted that where a mere wrong-doer—a naked trespasser—enters upon the land of another, and makes improvements thereon of a permanent character, such improvements become the property of the land owner; and this will apply to railroad companies as well as to others. If a railroad company should enter upon the land of another without any color of claim or right or privilege, as a mere wrong-doer—a naked trespasser—and construct a railroad track on such land, such railroad track would, of course, become the property of the land owner. * * *

But neither the foregoing principles nor the above authorities apply to the present case. The railroad company in the present case was not a wrong-doer nor a trespasser in any sense. It was a duly organized railroad company under the laws of Kansas, and had a right to build its railroad across the plaintiff's land, provided, of course, that it first procured the right of way from the owner of the land; and it had the right to procure such right of way by condemnation proceedings, as the representative of the sovereign authority, the State of Kansas, for the operation of a railroad is everywhere considered and held to be a public purpose, and the statutes of Kansas authorize such condemnation proceedings. And the railroad company took possession of the land for its right of way, and appropriated the same to its own use, with the consent of the only person who had possession of the land, and the only person who seemed at the time to be the owner thereof. This person was B. F. Files. He had the unquestioned possession of the land, and claimed title thereto, and claimed the land as his own. He had tax deeds on all the land through which the defendant's railroad was constructed. * * * Nor has the plaintiff treated the railroad com-

pany as a trespasser. He has allowed the company to retain its right of way as a permanent easement, and simply sues it for compensation and damages. * * * Under such circumstances the railroad company will not be required to pay for the improvements which it itself made upon the land, but will be required to pay only the value of the strip of land which it appropriated, and the damages to the other land; and this value and these damages will be computed as of the time when the railroad company first took possession of said strip, and occupied the same as its right of way. This, we think, is founded in reason and sustained by the weight of authority. (Citing authorities.) * * *

It has even been held that, where a railroad company enters upon land as a technical trespasser, and afterwards procures the land for its right of way by condemnation proceedings, it is not compelled to pay for the improvements which it itself made upon the land while it was technically a trespasser, and before it legally procured its right of way. *Justice vs. Nesquehoning R. Co.*, 87 Pa. 28; *Daniels vs. Chicago, I. & N. R. Co.*, 41 Iowa 52; *Lyon vs. Green Bay & M. R. Co.*, 42 Wis. 538; *Greve vs. First Div. of St. Paul & P. R. Co.*, 26 Minn. 66, 1 N. W. 816. This seems like justice, but whether it is or not, surely where a railroad company enters upon a piece of land for the purpose of constructing a railroad track, and does so under the honest belief that it has a right to do so, and expends thousands of dollars thereon under such belief, and no person objects to its occupancy, or questions its right, while it is expending its money making improvements on the land, and where the paramount owner of the land afterwards treats the railroad company, not as a trespasser upon his land, but as a party which has in fact

procured a permanent right of way over the land, and upon said theory sues the railroad company merely for the damages resulting from the permanent taking of the right of way, including the value of the land taken, and the permanent damages to his other property, he cannot say that the railroad company was at any time a mere trespasser; and he can recover only for the value of the land taken, and the damages to that not taken at the time when the railroad company first entered upon his land, and occupied the same for the purpose of procuring a right of way.' In *Atchison, T. & S. F. R. Co. vs. Morgan*, 42 Kan. 23, 4 L. R. A. 284, 21 Pac. 800, the railroad company dug a well and put in a pump and boiler for the purpose of filling a water tank on the line of its road, believing that the well and its attachments were upon its own property. When it was discovered that the same were upon the land of another, it was held that the pump and boiler could be removed without paying the owner of the land therefor. The court said: 'It can readily be seen that one of the tests of whether a chattel retains its character or becomes a fixture is the uses to which it is put. * * * If the company had placed it there, even under a mistake, for the purpose of ultimately improving the real estate, the law might, under this state of facts, have held it to be the property of the owner of the real estate; but under the agreed statement it was placed there solely for the purpose of better operating its own railroad. * * * We believe, in this action, because the improvements did not end and were not intended to benefit the realty, that the pump, boiler, and building should be held to be personal property, and not fixtures.' "

The case of *Justice vs. Nesquehoning Valley R. R. Co.*, 87 Pa. 28, is a leading case, frequently referred to in the decisions of other cases on this subject, and cited with approval by Chief Justice Fuller in the *Searl* case. This is an extreme case. After unsuccessful efforts at negotiation, without the consent of the owner, the railroad company entered upon the property and built its road. The entry was clearly a trespass. Proceedings to recover on the part of the owner of the land were stayed, and the railroad instituted proceedings to condemn. Chief Justice Agnew, in delivering the opinion of the court, said:

"The case differs in essential respects from that of a mere tortfeasor whose structures upon the land of another inure to the benefit of the owner of the land. The common law rule is undoubted that a trespasser who builds on another's land dedicates his structures to the owner. The reason is obvious, for, like him who sows where he cannot reap, he can obtain no advantage by his wrong, and having affixed his chattels to the reality they become a part of it; he cannot add further injury by tearing them down. Even a tenant is to a modified extent affected by the same rule. There is, however, a clear distinction between putting down a railroad track under a lease, and an act of appropriation of the land under a charter. The very intent of an appropriation of land is to place upon it, and own and use the structures necessary to carry out the charter purpose. Hence, no dedication of the material can be inferred in such a case. Modern inventions and discoveries have so far transcended the conditions of former times that to apply the rule as to a mere trespasser whose entry is a tort, pure and simple, to the

case of one authorized to enter for a great public purpose, merely because of an irregularity in the manner of proceeding, would be as vain as to attempt to dress a full-grown man in the garb of his childhood. This is not the case of a mere trespass by one having no authority to enter, but of one representing the State itself, clothed with the power of eminent domain, having a right to enter and to place these materials on the land taken for a public use—materials essential to the very purpose which the State has declared in the grant of the charter. It is true that the entry was a trespass, and the citizen is entitled to redress. But his redress cannot extend beyond his injury. It cannot extend to taking personal chattels of the railroad company. They are not his, and cannot increase his remedy. The injury was to what the land owner had himself, not to what he had not. Then why should the materials laid down for the benefit of the public be treated as dedicated to the land? In the case of a common trespasser the owner of the land may take and keep his structures *volens volens*; but not so in this case, for though the original entry was a trespass, the company can proceed in due course of law to appropriate the land, and consequently to reclaim and avail itself of the structures laid thereon. Another evident difference between a mere tortfeasor and a railroad company is this—the former necessarily attaches his structures to the freehold, for he has no less estate in himself, but the latter can take an easement only, and the structures attached are subservient to the purpose of the easement. A railroad company can take no freehold title, and when its proper use of the easement ceases the franchise is at an end. There is no intention, in fact, to attach the structures to the freehold. We have, therefore,

the salient features to characterize the case before us, to-wit: The right to enter on the land under authority of law to build a railroad for public use; the acquisition thereby of a mere easement in the land; the entire absence of an intention to dedicate the chattels entering into its construction to the use of the land; the necessity for their use in the execution of the public purpose; and lastly, the power to retain and possess these chattels and the structures they compose by a valid proceeding at law, notwithstanding the original illegality of the entry.' * * * We think, therefore, the ownership of the rails, ties, etc., did not vest in the plaintiff in error by the mere trespass in the original entry."

In *Toledo, &c., R. R. Co. vs. Dunlap*, 47 Mich. 347, possession was taken by the Railroad Company without consent of the owner of the fee, and in proceedings subsequently taken to acquire the title, the owners claimed the value of the improvements. Judge Campbell, whose opinions are always entitled to careful consideration, speaking for the court, in deciding adversely to this claim, said:

"We are of opinion that no error was committed in excluding from the compensation allowed to Dunlap, the value of the railroad track laid upon the land. We think the case cannot be distinguished from *Morgan's Appeal*, 39 Mich. 675. The railroad company, whether rightfully or wrongfully, laid its track while in possession, and for purposes entirely distinct from any use of the land as an isolated parcel. It would be absurd to apply to land so used, and to a railroad track laid on it, the technical rules which apply in some other cases to structures inseparably attached to the freehold. Whatever rule might apply in case of abandonment, it

is clear that this superstructure was never designed to be incorporated with the soil except for purposes attending the possession, and in a proceeding to obtain a legal and permanent right to occupy the land for this very purpose, there would be no sense in compelling them to buy their own property; whatever right of redress, if any, Dunlap may have for the tortious occupancy previous to these proceedings, or whatever right of property he might have in case the company abandoned entirely and left the track untouched, we think that so long as it is in possession, legal measures or proceedings to secure a right to retain it there, this structure belongs to the company, whether intruders or not."

While some of the cases make this exception to the common law rule, in view of the right of the railroad or corporation entering and making the improvements to subsequently acquire title by condemnation, yet other opinions rely upon the doctrine of trade fixtures, or principle analogous to this, in recognition of the fact that the improvements put upon the land for railroad purposes could in no way be considered as accessory or appurtenant to the land as an isolated property, but only useful and having any value as connected with the other railroad property, and to be used in transportation as a whole.

So in the case of *St. Louis, &c., R. R. Co. vs. Nyce*, 48 L. R. A. 245, the court says:

"The road was alone adapted to the transportation of persons or property. All its parts were merely accessory for its business, and were put on the land for this purpose, and not as accessories to the land over which the road was to pass. That part of the road built

on the premises of the plaintiff in error in the suit, disconnected from other parts of the road, could not be operated, and would be useless as a railroad, nor could it serve any useful purpose as an appurtenance to the land on which it was built."

Continuing, and referring to a case previously cited, the court said:

"The general principle to be kept in view which underlies all questions of this kind, is the distinction between the business which is carried on in or upon the premises, and the premises *locus in quo*. The former is personal in its nature, and articles that are merely accessory to the business, and have been put on the premises for this purpose, and not as accessories to the real estate, retain the personal character of the principle to which they appropriately belong and are subservient; but articles which have been annexed to the premises, accessory to it, whatever business may be carried on upon it, and not peculiarly for the benefit of a personal business which may be of temporary duration, become subservient to the railroad, and acquire and retain its legal character. The railroad company acquired an easement in the land, to construct and use its road thereon. It did not bind itself to the land owner either to build or maintain the road, and it could change the character of the structure at pleasure." (Quoted from *Wagner vs. Cleveland, &c.*, 22 Ohio St. 563.)

In *Northern Central R. R. Co. vs. Canton*, 30 Md. 347, the same principle and analogy is recognized.

In *Seattle, &c., R. R. Co. vs. Corbett*, 60 Pac. Rep. 127, the Supreme Court of Washington says:

"The question is not controlled by the rule of the common law under which structures erected by tortfeasors become part of the real estate. Unlike tortfeasors at common law, the railroad company possesses the power to condemn and acquire title, the condition upon which it might do so being that it should make just compensation, and it would be monstrously unjust to hold that it should be required to pay the value of the improvements which it had placed upon the land prior to its acquisition. The law upon the subject is well settled, and the question does not justify extended discussion."

It will not serve any useful purpose to make further reference to the numerous authorities supporting our contention, for to do so would be but to multiply unnecessarily cumulative testimony to the universal recognition of the principle. So far as we have been able to ascertain, there is not a State in the Union in which the principle has been decided contrary to our contention.

To meet the situation presented by the universal approval of the principle upon which the Supreme Court of Appeals of Virginia relies in approving the award of the Commissioners disallowing for improvements, the plaintiffs in error claim that the Bay Shore Terminal Company did not have power to exercise the right of eminent domain as against the Consolidated Turnpike Company at the time it entered into possession under the deed from the Consolidated Turnpike Company and made the improvements in question, for the reason that under the law as it stood in Virginia at that time, one public service corporation could not exercise the power of eminent domain against another public service corporation.

The plaintiffs in error rely upon this alleged condition, and it is upon this false premise that the learned counsel in their brief on behalf of the plaintiffs in error undertake to establish their position by a proposition in formal logic. The truth of the case is that the right of condemnation as against Walter H. Taylor, Trustee, or any other party against whom the proceedings in this case were directed is not at all dependent upon the question whether or not the proceedings could be had against a public service corporation. It is not open to question in this case but that the proceedings here were against other estate or property than that of the public service corporation, the entire interest and estate of the public service corporation having been acquired under grant from the Consolidated Turnpike Company.

It is obvious that the condemnation proceedings in question were not against the public service corporation when instituted nor would they have been against the public service corporation if instituted prior to the entry in 1902. All right, title and interest of the Consolidated Turnpike Company in and to the land sought to be acquired was secured by deed or grant from that company and the outstanding interest was that of the trustee and it was that as well as the interest of other encumbrances which the Circuit Court of the United States directed should be acquired in the condemnation proceedings. The petition in condemnation proceedings (Record, p. 21) sets out the fact that the interest of the Consolidated Turnpike Company had been acquired and that the proceedings were necessary to secure a good title. No suggestion is made anywhere that it was necessary to secure anything further from the Consolidated Turnpike Company. Irrespective of

the question as to whether the Bay Shore Terminal Company could have acquired by condemnation proceedings the right of way belonging to the Consolidated Turnpike Company in proceedings against that company, there can be no question but that the Bay Shore Terminal Company could, at all times when in lawful possession of the property acquired from the Consolidated Turnpike Company, have instituted condemnation proceedings to acquire any outstanding title or interest and that is what was done in its behalf under the direction of the Circuit Court of the United States by the receivers of the Bay Shore Terminal Company in these proceedings. There is nothing in the contention of the plaintiffs in error. The conclusion from the formal syllogisms in the brief on behalf of the plaintiffs in error absolutely falls because of the false minor premise in the first syllogism which is, "The improvements made in the case at bar were made before the condemnation act had been passed when no right of condemnation existed." The condemnation act referred to was one expressly authorizing condemnation of public service property but the proceedings in question were not based upon this act and have no relation thereto as will be seen from the procedure taken.

The answer to the position of the plaintiffs in error is therefore two-fold:

First. The Bay Shore Terminal Company, as we have said, acquired all the interest of the Consolidated Turnpike Company, the public service corporation, by the conveyance from the Consolidated Turnpike Company dated the 1st of March, 1902, and the condemnation proceedings were instituted

to acquire the interest and title of the trustee and any other person or corporation having an interest or claim against the land by deed of trust or other lien of record. (Record, p. 21.)

The petition for condemnation proceedings (Record, p. 21) fully sets out the acquisition of the interest of the Consolidated Turnpike Company and the necessity of proceeding to acquire the outstanding interest represented by the deed of trust or mortgage or other liens of record.

When objection was made in the trial court to the appointing of Commissioners on the ground that this was the property of a public service corporation and the permission of the Corporation Commission of Virginia had not been secured, the trial court held that the proceedings were to condemn the outstanding interest of the trustee and not the property of the Consolidated Turnpike Company.

It will be seen that this question was raised on demurrer by Arthur W. Depue, the plaintiff in error and necessarily decided adversely. From the opinion of the Circuit Court of Appeals of the United States upon the injunction proceedings, which is brought into this record, it will appear that this court also considered the proceedings to acquire the interest of the trustee and not against the property of the Consolidated Turnpike Company. The opinion (Record, p. 124) contains this statement:

"The object of which was to condemn the very mortgage interest which the appellant now proposes to enforce."

There can be no question that a corporation having the power of eminent domain, may in securing a fee simple title to land necessary for its purposes where the estate is divided, secure by purchase such interest as may be acquired by agreement and then proceed by condemnation to secure any outstanding interest or encumbrance that it has not been able to acquire by agreement.

The trial court necessarily reached the conclusion that the proceedings were not against the public service corporation inasmuch as it did not require that the procedure be followed as provided for by the statute law of Virginia (Code, Sec. 1105e, 52) which requires proceedings to be first had before the State Corporation Commission of Virginia. The Supreme Court of Appeals of Virginia also necessarily held that these condemnation proceedings were not to acquire the property of a public service corporation.

Second. The plaintiffs in error cannot now be heard to complain that these proceedings were against a public service corporation. They are estopped by the familiar principle that, "a party cannot assume successive positions in the course of a suit or series of suits in reference to the same fact or state of facts which are inconsistent with each other and mutually contradictory. Having assumed one position he and his privies are thereafter estopped from assuming a conflicting position touching the same subject."

The plaintiffs in error insisted before the trial court and the Court of Appeals of Virginia that these condemnation proceedings did not require the certificate of the State Corpo-

ration Commission of Virginia necessary when condemning the property of a public service corporation for the reason that these proceedings were not against a public service corporation. In paragraph 8 of the exceptions filed by Arthur W. Depue, in which subsequently Walter H. Taylor, Trustee, united, it is expressly stated that the proceedings were against the Trustee and the bondholders and not against the Consolidated Turnpike Company. (Record, p. 53.)

It will be seen from the opinion of the Supreme Court of Appeals of Virginia that before that tribunal the now plaintiffs in error, the appellees there, took the position that the certificate of the State Corporation Commission was not necessary because the condemnation proceedings were not to acquire the property of a public service corporation. In other words, in the trial court and in the Supreme Court of Appeals of Virginia the plaintiffs in error here insisted before those tribunals that the condemnation proceedings were against the mortgagee and not against the public service corporation.

It is respectfully submitted that, in accordance with the well recognized principles which we have cited, the plaintiffs in error will not now be permitted to reverse their position.

But whatever view may be taken as to the right of the condemnor to exercise the power of eminent domain at the time of original entry it cannot affect the result in the case at bar for this court has declared that it is not material whether the condemning party at the time of the entry into possession under defective title, had or had not the power to condemn. The precise question was presented in *Scarl vs. School District*, 133 U. S. 564, where this court said:

"It is not denied that the school district, when it filed its petition, was entitled to acquire the property in the exercise of the power of eminent domain, but it is said it could not do so prior to February 13, 1883, the date of the passage of an act rendering such action on its part lawful. Sess. Laws, Colorado, 1883, 263; Gen. St. Sec. 3044, 893. *But we cannot perceive that this affects the precise question before us.* Inability to condemn indicates that possession was not taken with the view of proceedings to that end, but that is conceded on the other ground, that the school district believed that it had the better title and erected its building accordingly. When it came to possess and exercise the power, the inquiry was limited to such compensation as was just and did not embrace remote or speculative damages, or payment for injuries not properly susceptible of being claimed to have been sustained." (Italics ours.)

There is no question in the case at bar but at the time of the institution of the proceedings to condemn the power was lawfully exercised.

In conclusion, we respectfully submit:

First. That this case should be dismissed for want of jurisdiction in this court in that it appears from the record that the alleged Federal question sought to be relied upon in this court was not raised in the proceedings until the petition to rehear in the Supreme Court of Appeals of Virginia filed after final judgment in that court; that said petition was not entertained by the Supreme Court of Appeals of Virginia and, therefore, under familiar rules sustained by

numerous decisions of this court, the alleged Federal question was not raised in time to give this court jurisdiction.

Second. That even if this court has jurisdiction, the plaintiffs in error have not been deprived of their property without due process of law or without just compensation and that none of their rights under the Constitution of the United States or any amendment thereto have been violated, and that the decision of the Supreme Court of Appeals of Virginia was clearly correct and should be affirmed.

Respectfully submitted,

HENRY W. ANDERSON,

E. RANDOLPH WILLIAMS,

Attorneys for Norfolk & Ocean View Railway Company.

APPENDIX

For the convenience of the court, we present here an extract from the charter of the Bay Shore Terminal Company, expressly authorizing the exercise of the power of eminent domain and also a section from the statute law of Virginia providing generally for the exercise of this power by public service corporations, both of which were in force at the time the Bay Shore Terminal Company entered into possession of the property in question.

The act to incorporate the Bay Shore Terminal Company is found in the Acts of the General Assembly of Virginia for the session 1899-'00, at page 755. The only portion, however, in any way material to the issue in this case, is Section 2, which is as follows:

"2. The said company shall have perpetual succession and a common seal which it may alter or renew at pleasure, and may sue and be sued and shall have the power to acquire by condemnation in accordance with the laws of the State of Virginia, all lands required for the right of way for its tracks and the necessary stations and depots for its operation, and shall have, possess and enjoy all of the rights and privileges necessary for the purpose of its incorporation and which are not in conflict with the general laws of the State of Virginia."

The general statute of the State of Virginia in effect at the time the Bay Shore Terminal Company entered upon the

right of way acquired under the deed from the Consolidated Turnpike Company will be found in the Code of 1887, Chapter XLVI, the only section of which, however, that we deem material is Section 1074, as follows:

"If the president and directors of a company incorporated for a work of internal improvement, the court of a county, the council of a city or town; the Institution for the Deaf and Dumb and the Blind, or any of the State lunatic asylums cannot agree on the terms of purchase with those entitled to lands wanted for the purposes of such company, county, city, town, institution or asylum, five disinterested freeholders (any three of whom may act), shall be appointed by the court of the county or corporation in which said land, or the greater part thereof, lies, for the purpose of ascertaining a just compensation for such land."

IN THE
Supreme Court of the United States.

No. 152, October Term, 1912.

CONSOLIDATED TURNPIKE COMPANY, AR-
THUR W. DEPUE AND WALTER H. TAYLOR,
TRUSTEE,

Plaintiffs-in-error-Petitioners,

vs.

NORFOLK AND OCEAN VIEW RAILWAY
COMPANY.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE
STATE OF VIRGINIA.

PETITION FOR REHEARING.

Come now Consolidated Turnpike Company, Ar-
thur W. Depue and Walter H. Taylor, Trustee, Plain-
tiffs in error, and respectfully petition this Honorable
Court for a rehearing of said cause for the following
reason, to-wit:

Because the opinion handed down by this Honor-
able Court, it is respectfully submitted, shows that the
cause was decided under a misapprehension of the
facts involved, in that:

The certificate of the involution of a federal question (Record, p. 143) was *not* the certificate of the Chief Justice of the Supreme Court of Appeals of the State of Virginia but the certificate of the said Court itself and by it made a part of the record in the cause. The language of this certificate shows that fact beyond the possibility of doubt:

"And now, to wit, October 14th, 1910, on motion of the defendants in error, Consolidated Turnpike Company, Walter H. Taylor, Trustee, and Arthur W. Depue, this Court orders it to be certified and made part of the record in this case, and the Honorable James Keith, President Judge of said Supreme Court of Appeals does now certify that," etc.

How then can it be said that: "This certificate was never made the order of the court and a part of the record, as in *Marvin v. Trout*, 199 U. S. 212"? The language of the certificate in *Marvin v. Trout* is identical in substance and almost identical in form with that in the present case. It is (199 U. S. at page 217):

"Whereupon, on motion of said plaintiff in error, William Marvin, *the court order it to be certified and made part of the record of this case* and of the judgment of affirmance heretofore entered herein, that this action is founded upon," etc.

Mr. Justice Peckham, speaking of the certificate, said (page 223):

"It is a certificate from the court as distinguished from one by an individual judge.

"The petition in error does not show that any question involving the Federal Constitution was actually argued or brought to the attention of the Supreme Court. . . . As the certificate in the case at bar was made by the court, and was

“ordered by it to be attached to and form part of
 “the record itself, it is perhaps sufficient to show
 “that some questions of a Federal nature were be-
 “fore that court and decided by it.”

In other words, *Marvin v. Trout* was a case where no federal question was raised by the pleadings or on the trial of the case (page 222) and where the petition in error did not show that any federal question was actually argued or brought to the attention of the Supreme Court (page 223), and yet this Court, simply and entirely on the strength of the certificate, proceeded to hear and determine it.

Wherefore your petitioners pray that an order may be made for a rehearing of this cause.

CONSOLIDATED TURNPIKE COMPANY,
 ARTHUR W. DEPUE,
 WALTER H. TAYLOR, TRUSTEE,

By CHARLES H. BURR,
their Counsel.

CERTIFICATE OF COUNSEL.

I, CHARLES H. BURR, hereby certify that I am attorney of record for the plaintiffs in error herein, that the foregoing petition for a rehearing is not interposed for delay and that in my judgment the said petition is well founded.

CHARLES H. BURR.

CONSOLIDATED TURNPIKE COMPANY *v.* NORFOLK & OCEAN VIEW RAILWAY COMPANY.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 152. Argued January 28, 29, 1913.—Decided April 14, 1913.

Under § 237 of the Judicial Code, as under § 709, Rev. Stat., in order to give this court jurisdiction to review the judgment of the state court it must appear that some Federal right, privilege or immunity was specially set up in the state court, passed on and denied.

While just compensation for private property taken for public use is an essential element of due process of law under the Fourteenth Amendment, the question of whether every element of compensation was allowed by the state court cannot be reviewed in this court except as based on claims specially set up in and denied by that court.

Where there is an equal right to compensation under the state constitution as under the Fourteenth Amendment, a mere demand for just compensation not specifically made under Federal right does not raise a Federal question.

An exception to the report of Commissioners on the ground that their interpretation of the state statute of eminent domain violates a specified clause of the Federal Constitution does not give this court the right to review the judgment on the ground that other rights of the plaintiff in error under the Constitution have been violated.

It is too late to raise the Federal question for the first time in a petition for rehearing after judgment of the state court of last resort unless the record clearly shows that the state court actually entertains the petition and decides the question.

Where the state court denies a petition for rehearing, setting up a Federal question for the first time, without opinion, it does not pass on the Federal question even though it states that the petition has been maturely considered. *Forbes v. State Council*, 216 U. S. 396.

While a certificate of the state court can make more definite and certain that which is insufficiently shown in the record, it cannot import the question into the record and in itself confer jurisdiction on this court to review the judgment.

Writ of error to review 111 Virginia, 131, dismissed.

CERTAIN facts essential to the presentation of the questions of law upon which the judgment must turn will be preliminarily stated.

The Consolidated Turnpike Company, a corporation of the State of Virginia, acquired and united two or more toll roads, extending from Norfolk to Ocean View, on the seashore. The land acquired was somewhat more than was needed for a turnpike and so the turnpike company, by warranty deed, conveyed a strip 18 to 25 feet wide to the Bay Shore Terminal Company, also a Virginia corporation, upon which the latter company constructed a line of electric railway, with the necessary power houses and stations. This conveyance was made subject to two prior mortgages. These mortgages were for the purpose of securing bonds, and the plaintiff in error Taylor is trustee in both, and the plaintiff in error Depue a holder of some of the bonds.

The Bay Shore Company in time became insolvent, and a creditor's bill was filed in the Circuit Court of the United States at Norfolk, and its road and assets of every kind placed in the hands of a receiver. In that proceeding it appeared that its property was encumbered by the two mortgages before referred to and other liens. To clear the title before sale the Circuit Court directed its receiver to file a proper proceeding in a court of the State for the purpose of condemning any adverse title and all outstanding claims or liens against the land occupied by its tracks and appliances. Such a proceeding was accordingly filed, and Taylor, as trustee under the two deeds in trust, was made a defendant, together with certain others claiming other interests or liens. Depue, as a holder of bonds secured by the deeds in trust, intervened in behalf of himself as a beneficiary. The final decree in that proceeding is the decree here under review. Pending the condemnation proceedings, the property of the Bay Shore Terminal Company was sold under a decree made in the

original winding up suit in the United States Circuit Court, and purchased by the defendant in error, the Norfolk and Ocean View Railway Company, and conveyed to that company, "with the benefit of and subject to all suits and proceedings which have been or may be instituted by said receiver."

Pending this condemnation proceeding, Taylor as trustee and Depue as a beneficiary, although parties to the pending condemnation case, began, in a state court, a proceeding against the turnpike company to foreclose the mortgages referred to. The Ocean View Company, as purchaser of the property of the Bay Shore Company under the decree of sale made by the Circuit Court of the United States, applied to that court by petition and supplemental bill to enjoin the foreclosure suit until the proceeding to condemn the mortgagee interest pending in another state court should be decided. It was accordingly enjoined and upon appeal by Taylor, trustee, to the Circuit Court of Appeals, the injunction decree was upheld. 162 Fed. Rep. 452.

Recurring now to the condemnation proceeding: Commissioners were appointed and directed to ascertain "a just compensation for the interest of all persons or corporations having any interest in or claim against or lien upon said land, either by deed in trust or mortgage." They were directed to report the present value of the land with and without improvements and the value thereof on May 1, 1902, the date of the conveyance of same by the Consolidated Company to the Bay Shore Company. The Commissioners' report was as follows:

"If valued as of the 1st day of May, 1902	\$5,000.00
Will be a just compensation.	
If valued as of the date of this report, without	
improvements.....	6,200.00
Will be a just compensation.	

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For the land, with improvements.	7,200.00
For the steel rails	15,000.00
For the railroad ties	1,250.00
For the poles	1,250.00
For the overhead construction	2,500.00
For the machinery in power house.	25,000.00
For the buildings on Tract No. 2.	5,000.00

Making a total of \$57,200.00

Will be a just compensation."

Later the report came on to be heard upon exceptions filed thereto by Depue, as representing the beneficiaries under the Taylor mortgages. Taylor, as trustee, had all along been a party, and when Depue waived and withdrew nine of his exceptions to the report Taylor joined him in such waiver of exceptions. The exceptions which remained included exceptions to the valuation reported as of May, 1902, and the valuation reported as of the date of the report, May 15, 1906.

As the report was in the alternative the question was whether that part of the report which fixed the value without improvements, or that part which fixed the value with improvements should be adopted. The trial court fixed the just compensation at \$57,200, which included the value added by the railway and stations which had been placed thereon by the Bay Shore Company, the predecessor in title of the Ocean View Company, and directed the latter company to deposit that sum in bank subject to the court's order.

From this decree an appeal was taken to the Supreme Court of Appeals of Virginia, where it was held that the compensation for the mortgagee interest should have been limited to the present value of the property without improvements placed thereon by the Bay Shore Company.

Mr. Charles H. Burr for plaintiffs in error.

Mr. Henry W. Anderson, with whom *Mr. E. Randolph Williams* was on the brief, for defendant in error.

MR. JUSTICE LUTON, after making the foregoing statement, delivered the opinion of the court.

The case comes here under § 709, Revised Statutes, now § 237 of the new Judicial Code. It must therefore appear that some right, privilege or immunity was claimed under the Constitution, or some statute of the United States, and that the decision was against the right, privilege or immunity so claimed and specially set up by the plaintiff in error.

The error assigned here is that in permitting the condemnation of the interest of the mortgagees in the strip of land condemned without including the value of the permanent improvements placed thereon by the predecessor in title of the defendant in error, the Virginia court has authorized the taking of the property of the mortgagee plaintiff in error "without due process of law, in violation of the Constitution of the United States."

Just compensation for private property taken for public use is an essential element of due process of law as guaranteed under the Fourteenth Amendment. *C., B. & Q. R. R. v. Chicago*, 166 U. S. 226. The argument is that, if, therefore, just compensation required that the compensation awarded for the interest condemned should include the value of the land with improvements, and the value of such improvements be not so included, due process is lacking; that it would not in such case be a mere claim of inadequate compensation, but a denial of all compensation for an element of value actually existing as a part of the property taken. *C., B. & Q. R. R. v. Chicago*, *supra*; *Appleby v. Buffalo*, 221 U. S. 524.

Before considering whether this is a case for the application of the principle invoked, however, the preliminary question is whether any such claim or right under the Fourteenth Amendment was "specially set up" in the state court, and whether the record shows that the right so specially set up was denied?

It is contended that the right to just compensation was the whole substance of the litigation in the state court, and that this right arose under the Constitution of the United States. This latter assertion does not necessarily follow, since under the law and constitution of the State the plaintiffs in error were equally entitled to due process of law including just compensation for property taken for public purposes, and the case might well have been litigated wholly upon local law. Just such a contention was held ineffectual in *Osborne v. Clark*, 204 U. S. 565, 569, when it was said:

"If a case is carried through the state courts upon arguments drawn from the state constitution alone, the defeated party cannot try his chances here merely by suggesting for the first time when he takes his writ of error that the decision is wrong under the Constitution of the United States. *Crowell v. Randell*, 10 Pet. 367, 398; *Simmerman v. Nebraska*, 116 U. S. 54; *Hagar v. California*, 154 U. S. 639; *Erie Railroad v. Purdy*, 185 U. S. 148, 153."

The ground upon which the claim was asserted to compensation for the improvements placed upon the land by the Bay Shore Company was the common-law principle that permanent structures placed upon the realty of another by a trespasser, become the property of the owner and pass under any incumbrance created by the owner. Therefore, it was contended, if the Bay Shore Company saw fit to construct upon land subject to the deeds of trust represented by the plaintiffs in error, with no other authority than that of a deed from the mortgagor in possession, the structures placed thereon passed under the mort-

gage, and any decree condemning the land which denied compensation for the value of the land thus enhanced operates to deprive the mortgagees of a part of their security without due process of law.

This view of the law of the State was the view which the trial court accepted, upon the authority of the case of *Newport News &c. Ry. v. Lake*, 101 Virginia, 334. The Supreme Court of the State upon appeal (111 Virginia, 131) reversed this conclusion and held that, "where a corporation clothed with the power of eminent domain, lawfully enters into the possession of land for its purposes, and places improvements thereon, and afterwards institutes condemnation proceedings to cure a defective title, or to extinguish the lien of a deed of trust, it is not proper in ascertaining 'just compensation' for such land to take into consideration the value of such improvements.

"The commissioners in their report ascertained the value of the land, as of the date of their report, without considering the improvements, at \$6,200. This sum we think should have been fixed as the just compensation for the land taken, and that the trial court erred in not so holding."

The case of *Newport News &c. Ry. v. Lake*, *supra*, relied upon by the trial court, was distinguished, the Supreme Court saying that in that case, "the premises had been sold under the deed of trust and the purchaser, who was the defendant in the condemnation proceedings, had recovered the premises in an action of ejectment after the improvements had been placed upon the premises by the railway company under the authority of the grantors in the deed of trust," and was therefore not limited to the value of the land as it was before the improvements.

Up to the filing of this opinion by the Supreme Court of the State no right or claim to due process of law under the Fourteenth Amendment was anywhere specially set up upon the record. Nor is there any mention of the

Constitution of the United States aside from that found in the fifteenth exception to the report of the commissioners to assess compensation. The exception referred to was in these words:

"15. Said report is also excepted to by said Arthur W. Depue on the ground that if it is held that the proper interpretation of the present statute of eminent domain is that this property can be taken and that in the measure of damages the value of the land alone is to be considered without improvements, then that such interpretation impairs the obligation of a contract within the Constitution of the United States, because it is a different interpretation from what the Court of Appeals of Virginia prior to this new statute has placed upon the statute law relative to such improvements."

At most that is a vague claim that if the Virginia Eminent Domain statute shall be construed as excluding damage for improvements, there would result a change of decision which would impair the obligation of a contract.

No question of the impairment of the obligation of a contract was decided in the trial court nor in the Supreme Court, nor is any such question assigned as error here, nor presented in argument. Upon a petition for a rehearing filed in the Supreme Court one of several grounds stated was, that a decree taking the land in question without compensation for the improvements thereon would be "a taking without due process of law in violation not only of the constitution of Virginia, but of the Fourteenth Amendment to the Constitution of the United States." This application was refused, without opinion, the judgment entry being in these words:

"The court having maturely considered the petition aforesaid, the same is denied."

The words "maturely considered" do not import any decision of the question made. Just such an entry has

been held to be no more than a refusal to rehear the case: *Forbes v. State Council*, 216 U. S. 396.

Nothing is better settled than that it is too late to raise a Federal question for the first time in a petition for a rehearing, after the final judgment of the state court of last resort. If, however, the state court actually entertains the petition and decides the Federal question, and this appears by the record, the requirement of § 709 that the right shall be specially set up and denied is complied with. *McCorquodale v. Texas*, 211 U. S. 432; *Mallett v. North Carolina*, 181 U. S. 589; *McMillen v. Mining Company*, 197 U. S. 343, 347.

Having neglected to raise any Federal question before the final judgment in the state Supreme Court, and having failed to obtain a rehearing that the question might thereby be raised and a decision obtained upon it, the plaintiffs in error have endeavored to show that in fact the Supreme Court of Virginia did rehear the case upon their petition and did decide the Federal question, therein for the first time raised, adversely, by obtaining the certificate of the Chief Justice of the court, months after the court had handed down its final opinion, that the court, "refused the said petition for a rehearing on the ground *inter alia* that the decree or decision of this court . . . did not constitute a taking of the property of the defendants in error without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and that the said defendants in error were not thereby deprived of any rights under said Amendment." This certificate was never made the order of the court and a part of the record, as in *Marvin v. Trout*, 199 U. S. 212, where it was held "perhaps sufficient" to show what Federal question was decided in a case where no opinion was filed. But that such a certificate can do no more than make more definite and certain that which otherwise may be insufficiently shown by the record proper is the settled

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Argument for Appellants.

rule of this court. That in itself it cannot confer jurisdiction is too plain for controversy. *Seaboard Air Line v. Duvall*, 225 U. S. 477; *Home for Incurables v. New York*, 187 U. S. 155. At the utmost it may aid to the understanding of the record. *Gulf & Ship Island Railway v. Hewes*, 183 U. S. 66.

For the reasons stated, the writ of error must be

Dismissed.
